ESSAYS ON COMMERCIAL LAW.

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ON

THE LAW OF AGENCY.

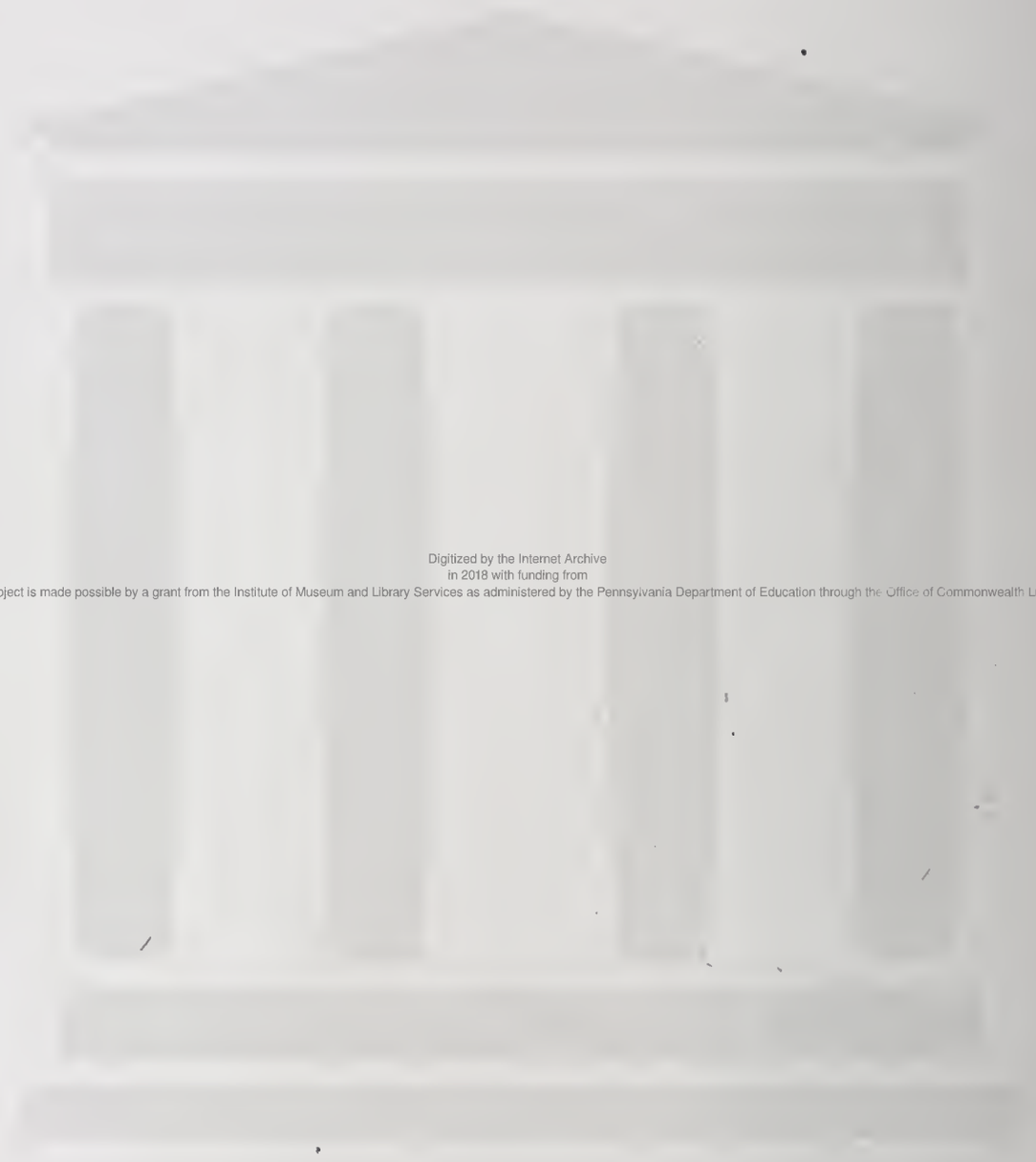
BY WILLIAM O. BATEMAN,

COUNSELLOR AT LAW.

PHILADELPHIA:

KING & BAIRD, No. 607 SANSOM STREET.

1858.



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PREFACE.

Books on the various branches of Commercial Law, have become so numerous, and are some of them so excellent, that were a professional aspirant to augment the list by a single volume, he might be regarded, and perhaps not unjustly, as attempting an unlawful levy upon public attention, and therefore as falling within the principle of the prohibitory writ *Ne injuste vexes.* The writer of the following pages admits the apparent justice of this complaint: he trusts however that in the present instance, he has a satisfactory reply, and in answer begs leave to exhibit this his justification. The writer, on admission to practice, was blessed with that leisure which the Goddess of Justice usually vouchsafes to the novitiates of her Temple. This leisure he endeavored to make a learned leisure; and with this view, devoted much attention to Agency, to Bailments, and to other commercial subjects. He took delight in comparing authors, and in noting their different modes of handling a topic; he adventured occasional criticism, and sometimes thought he made improvements. Errors and omissions sufficient to satisfy the moderate appetite of a critic, he either fancied or found. The faults however, of diffuseness, of bad or defective method, of imprecise or obscure statement, and frequently of non-apparent or nonexistent deductions of principles or rules, were among those which mainly arrested his attention. Yet these faults were, he thought, not inherent in the subjects but incidental to the authors.

He was of opinion that practical principles enunciated with a pregnant yet perspicuous brevity of expression, were things desirable and withal attainable. He believed that a rule and its reason might assistingly run together; and that a rigorous analysis and severe method, whilst they assured freedom from detail and from diffuseness, conduce to a ready comprehension and remembrance of the subject.

Having these considerations before him, and warned as well by closet-conference with silent authors, as by court-conflict with embodied intellect, he penned among others the following essay. Whatever be its merits or defects, the design was to avoid the faults above specified, and to present, within the compass of a small volume, and in a clear condensed and systematic form, the principles, authorities and practical applications of the law as appertaining to the relation of principal and agent.

The writer is far from supposing that he has accomplished his whole design. The *beau ideal* usually surpasses actual execution. The critic will doubtless discover *maculæ et lacunæ*, spots and gaps where possibly the writer saw not one. In candor, however, he admits that revised as the essay has been, he now observes some slight blemishes which he would gladly remove; and should a second edition be called for, he will endeavor to render it more worthy of approbation.

AGENCY.

From every relation of persons, arise *duties* and *rights:* and these, as growing out of the relation of agency, and as defined by our civil or municipal laws, form the subject-matter of the present essay.

As having duties and rights in any given relation, persons are *parties* to that relation. And though it is true that *one* person alone may be a party; yet, where there are *many* persons, all of whom have but *one* and the *same part*, standing or interest, in any given relation, they all are, as respects that relation, simply *one* and the *same party*. Thus, with reference to agency; where *many* persons join or unite in authorizing another to act for them, in a certain relation; the persons so joining or uniting all are, as to that relation, one and the same party; namely, the *principal:* where *one* person, in like manner, authorizes several others jointly to act for him; he is, as a party, the principal; and they are, as a party, the *agent:* also, where the principal by the agent, or the agent for the principal, transacts business, either with another who is acting for himself, or with many others all of whom have but one and the same interest; either, as the case may be, that other is, or those others are, as a party to the relation, the *third party:* so that it is a matter of the most perfect indifference, in the eye of the law, whether a party be *one* or *many* persons; seeing that a *unity of interest and of action* must be

apparent wherever any party is concerned. As to the *relation* itself; though it always supposes and arises from other anterior relations; it is more immediately established by an agreement of parties; and may in general be stated as that which, in the language of an approved writer,[1] takes place wherever one person authorizes another to do acts or make engagements in his name.

As respects the *capacity* of persons to become parties to the relation of agency, they ought, in general, to be legally competent to contract for themselves;—persons *sui juris*. For otherwise, the law can afford no civil remedy to one for any breach of contract by the other. With respect to the *agent*, however, this may admit of some qualification; for it is not in *all* cases necessary that he should be competent to contract in his own name, or on his own behalf;—since, as respects his *principal*, he may act *for him* regardless of any contract as between them which the law can recognize as such; and as respects *third parties*, he is not called upon to act in his own right or upon his own responsibility. Thus minors, married women, persons attainted or outlawed, and aliens, as it is said,[2] are competent to act as agents.

The case of infants or minors, with respect to their competency to act for others, is, but with respect to their personal responsibility, is not, entirely free from difficulty. They may certainly act as agents, and may consequently bind others by their acts; but will themselves in general be personally liable only for *torts* committed by them, and not on their contracts.

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[1] Paley, Agency, p. 1.

[2] Chitty on Contracts, 197. Story, Agency, § 7.

The same remarks apply, with but little if any qualification, to the case of married women. They may, perhaps, with respect to their own separate estates, authorize and appoint agents to act for them.[1] But if an authority to act as agent,—as if a warrant to confess judgment,[2]—be given to a *feme sole*, and she subsequently marry before executing it, her power further to act under it is *ipso facto* determined: for she can neither bind her husband without his consent, nor act as agent for another without prejudice to him.[3]

From the very general idea that we now have of the relation of agency, we proceed to the more particular examination and statement of what it contemplates: and in this,—as in the orderly and scientific prosecution of every other investigation,—the attention may be aided, the recognition of principles facilitated, and the subject-matter not only elucidated but also very greatly condensed, by analytical divisions and sub-divisions; these, therefore, will demand a share of consideration in exact proportion to the importance of a clear recognition of principles and a proper statement of their illustrations.

With respect to *agency* there are chiefly *three* things to be considered;—the consideration of which both completes and exhausts the inquiry into the *law* of agency as such;—namely; first, *the modes of establishing it;* secondly, *the rights of the parties to the relation;* and, thirdly, *its dissolution or determination.* In order, then, our attention is directed to—

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[1] See Story, Ag. § 6. But see ibid. § 481, and compare with § 485.
[2] 1 Salk. 117; 399.
[3] 5 East, 266.

(1[a.]) The Modes of Estabishng the Relation of Agency.

Since the relation of Agency supposes three parties, —the *principal*, the *agent*, and the *third* party; and since it can be established only by the *authority of the principal;* it follows that the proper method of examining the modes by which it may be established, is, first, *as between the immediate parties, the principal and the agent;* and, secondly, *as between the principal and third parties.* In order, then,—

(1[b.]) As Between the Principal and the Agent.

The relation can be established, as between the principal and the agent, only by the authority of the former, and the assent of the latter, to do the act, or manage the business, proposed as its aim and end.

The authority, on the one hand, as well also the assent on the other, with respect to the manner of its communication, may be either *express* or *implied:*— *express;* as when communicated *by words spoken;*[1] or *by written orders and declarations;*[2] or *by instruments under seal,*—called, indifferently, *letters* or *powers of attorney:*— *implied;* as where necessarily inferred *from the conduct and relations of parties.*

But whether the relation shall be established in one way or another, depends upon the nature of the service to be performed. For it is a general rule, that the

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[1] 9 Ves. 250. 8 Exch. 40. 11 Mass. 27; 97; 288. 1 Binney, 450. 8 Pick. 9. 1 Hall, 336. 4 Johns. Ch. R. 667.

[2] Even the wishes of the principal expressed in a letter to his agent, will amount to positive orders. 3 Harris, (15 P. S. R.), 229. 14 Peters, 479.

authority to do an act, must be communicated under such forms and solemnities as shall be legally necessary to evidence the execution of the act itself. So that wherever the authority is to make a sealed instrument of any kind,—as to make a *deed*,[1]—it ought to be expressly delegated by *deed;* that it may appear that the attorney or substitute had a commission or power to represent his principal; also that it may appear that the authority was well pursued.[2]

Formerly, indeed, by the strict rule of the common law, corporations,—not being able to manifest their intentions otherwise than by writing under their common seal,[3]—could authorize agents only by deed. Though now, at least in this country, that rule seems to be very generally repudiated; inasmuch as corporations, with respect to their agents, stand upon very nearly the same footing as individuals.[4]

For the most usual purposes of business and commerce, sealed instruments are of course entirely unnecessary, and an agent may be authorized by

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[1] Co. Litt. 48 b, 52 a. 7 Term. R. 209, 269. 5 Binn. 613. 2 Bibb's R. 174. 5 Mass. 11; 40, 52. 1 Badg. & Dev. 1. 2 Greenl. 260. 9 Wend. 68. 2 Dev. (N. C.) 90; 153. 14 Serg. & R. 331, 332.

Bac. Abr. *Authority*, A. Co. Litt. 48 b. See Story, Ag. §§ 46, 47, 49.

[3] 1 Bl. Com. 475. See Dunlap's Paley, 155 and n.

[4] 4 Cowen, 645. 32 Maine, 225, 228. 4 Serg. & R. 16. 13 Mass. 199. 12 Wheat. 40, 64. 7 Cranch, 299. 1 Har. & Gill. 324. 3 Rand. 136. 1 Dev. & Bat. 306. Ang. & Ames. on Corp. (3d ed.) 211, 212, et seq. 2 Kent, Com. (5th ed.) 290. Chitty on Cont. 196; 250; and notes. 8 Wheat. 338. 5 Wheat. 326. 9 Paige, 470, 496, 500. 1 Pick. 297, 304. 1 Peters, 46. 14 Peters, 19. 12 Johns. 227. 14 Johns. 118. 3 Wend. 94. 20 Wend. 91. 22 Wend. 348. 1 Cowen, 513, 536, 542. 10 Mass. 397. 16 Pick. 350. 7 Wend. 255. 1 Denio, 520, 522. 2 Conn. 252. 3 Serg. & R. 117.

simple writing or by words merely spoken, or by employment.

But from the fact that the agent is regularly authorized in some way; other very important considerations now arise, respecting the *construction* of his authority, and his *character* as determined thereby. In order, then, let us next consider—

(1c.) *The Interpretation or Construction of the Agent's Authority.*

It is a fundamental principle, underlying all the rules of interpretation and construction, that the *purpose*, *intention*, or *design*, *aim or end*, of an act or thing, is, when known, the true and only explanation of the meaning or significance of that act or thing. Hence it is, that, when in doubt of the intention or meaning of language employed, especially in legal instruments, the courts entirely disregard the punctuation, and even change, remove, or supply it, as that intention or meaning may seem to require.[1]

Whenever express terms are employed, they are necessarily taken to express the intention of the person using them. And therefore, wherever an authority is communicated in express terms, it will, in the first instance, always be construed with strict reference to those terms, as evidencing the purpose or intention of the principal in conferring the authority. Thus, if the import of those terms be very *general*, it will be evident that the principal intended to confide in the agent's discretion; if very *special*, *particular* or *definite*, as to what is authorized, then, on the contrary, it will be

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[1] As to this, see 4 T. R. (Durnf. & East.) 65, 66.

quite as evident that no discretionary power was designed to be conferred. Accordingly, the agent will be deemed to have, either a *general* or a *special* authority:—*general*, in exact proportion as it is addressed to his *discretion*, or confers upon him *discretionary* powers;[1] *special*, precisely in so far as it enumerates and specially defines his powers.[2] And as it is necessarily presumed, that he who commits his interests to the exercise of another's discretion, intends that that discretion shall be faithfully and carefully exercised; so the general duty of every agent,—whether general or special, indeed, for no authority can be so fully and precisely defined as to leave absolutely no room for the exercise of any judgment,—that duty, in a word, which a sound construction of his authority will demand of him, is at once foreseen; for, in exact proportion as anything is confided to his judgment or discretion, it will of course be his duty to exercise it for the benefit of his employer; while in so far as nothing is left to his own judgment, nothing can be expected from him but an unqualified and implicit obedience to orders.

Where the agency is created only by a written instrument, the nature and extent of the authority can be ascertained only from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, or of an intention to confer additional powers; for that would be to contradict,

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[1] See 8 Howard (U. S.), 468. 21 Wend. 279.

[2] *Discretionary power*, whether conferred in one way or another, has always, I believe, been deemed the true criterion of a *general* authority; as such, at all events, it has been well discriminated and established in a series of cases to which I shall subsequently refer.

and to vary the terms of the written instrument,[1] and thereby to do away with the very authority intended to be conferred. An *implied* authority cannot, in general, take place, where there is an *express* authority in writing;[2] for the maxim is, *expressum facit cessare tacitum*.[3]

But the question is either one of *construction* or of *enlargement* of the power. Thus, for the purpose of aiding the Court in *construing*, in ascertaining the *meaning* and *intention* of the instrument, where that is in doubt; whatever will aid in the construction of the powers actually or expressly given, will be received in evidence for that purpose; whether it be the usage in like cases or something else:[4] so that the agent will be justified in doing what from the instrument thus seems plausible and correct; and even though it turn out in the end to be wrong, as understood by the principal, the latter is still bound by the conduct of the agent.[5] Because, the person who deals with the agent is required, like him, to look to the instrument to see the extent of the power;[6] and if it be ambiguous, so as to mislead them, the injurious consequences should fall on the principal, for not employing clearer terms.[7] Also because, even though a power is given in writing, and not aided by language conferring a wide

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[1] 3 Harris, (15 P. S. R.), 233, (Rogers, J.)

[2] 3 Harris, 233.

[3] See Story on Agency, §§ 76, 77, 79.

[4] See 8 Howard (U. S.), 468, 469.

[5] 3 Wash. C. C. 151. 2 Ibid. 133. 4 Ibid. 551. 6 Cowen, 358. 8 Howard, (U. S.,) 468.

[6] 7 Barn. & Cres. 278. 1 Pet. 290.

[7] 2 Barn. & Ald. 143. 1 Pet. 290. 4 W. C. C. R. 551. 23 Wend. 268.

discretion; it must still be construed as intending to confer all the usual means, or sanction the usual manner of performing what is intrusted to the agent.[1] Nor is the power confined merely to "usual modes and means," but, whether the agency be special or general, the agent may use appropriate modes and reasonable means;—such are considered within the scope of his authority.[2]

Where the authority grows *wholly out of the instrument;* although, as just seen, if the meaning or intention be doubtful, it may be *explained;* yet, the power itself cannot be *enlarged* or *extended*, by *parol* evidence;[3] unless, indeed, that evidence go to show a *subsequent* enlargement, or to give an authority for a further purpose, or to show an express power engrafted on an existing agency, affecting it only *sub modo*, to a limited extent; for then the maxim loses its force and application.[4]

On the other hand, the authority of the agent may, as we have seen, be *implied;* that is, *inferred from the conduct and relations of the parties.* Wherever such is the case, that *conduct*, or *those relations*, will alone determine the nature and extent of the power conferred.[5] Thus, where a person simply sends his goods to an auctioneer, or other person whose regular business it is to sell for others; the person so sending

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[1] 10 Wend. 218. 2 H. Bl. 618. 4 Es. Ca. 65. Ambler, 186. Salk. 283. 13 Wend. 518. 6 Cowen, 359.

[2] 6 Hill, 338. 2 Pick. 345. Bell on Com. L. 410. 2 Kent's Com. 618. 1 J. J. Marsh. 287. 23 Wend. 268. 8 Howard (U. S.,) 468.

[3] Paley on Agency, by Lloyd, 179, n; and 198, n. Story on Agency, § 79.

[4] See Story, Ag. § 79; and see also, § 80.

[5] See Story, Ag. § 87.

will be held to have authorized the person so receiving the goods to sell them in the usual course of his business.[1] So a servant, who has *usually* been permitted to buy articles of a certain kind on his master's credit, will have an implied power to bind his master by a purchase on his credit of like articles, though he have no special authority to purchase them, and even though he make use of them for his own purposes;[2] but if the servant have uniformly bought with cash or ready money, he will have no such implied power.[3]

With more particular reference to a *general* authority; since, as above stated, it is confided in a general manner to the discretion of the agent; it is properly construed as extending to such acts as he himself shall deem proper and necessary to the execution of his trust. The agent stands in the place of his principal, in respect to the particular business, and should conduct it as a prudent and discreet man should manage his own affairs. He is therefore bound to exercise a sound discretion in the business in which he is engaged, and he possesses all the necessary implied powers within the scope of his authority for that purpose.[4]

The principal may, however, at any time, and in virtue of the same right by which he confers the authority, add to that authority any particular or

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[1] 15 East, 38, 45. 3 B. & C 42. 6 M. & S. 23, 24. 3 Bing, 145. 20 Wend. 267. 1 Metc. 202. Chitty on Cont. 196.

[2] See Dunlap's Paley, 162 and notes. A single case may be found (see 1 Str. 506,) in support of the position that if a master authorise even *one* credit transaction by his servant, he will be bound by a second even though it be unauthorized: a position which, however, is certainly unfounded in principle.

[3] 5 Esp. 76. 2 M. & W. 172, 181. 8 N. Hamp. 363.

[4] 21 Wend. 279. 8 Howard (U. S.,) 468, 469.

private instructions he may see fit to communicate to the agent for the purpose of guiding him in the exercise of his discretion; and though the agent will be bound to pursue such instructions with the strictest fidelity,[1] they will in no way affect third parties ignorant of them.

Hence it follows, that, so long as the agent keeps within the scope of his authority as generally known to third parties, his acts, even though contrary to his particular or private orders, will, in relation to those third parties, be regarded as the acts of the principal, and, as such, necessarily obligatory upon that principal.[2] No other rule can, with any justice or safety, be adopted; since it is impossible for third parties to know what the private instructions of the agent are, or upon what ground he exercises his discretion. Whether he has, or has not, private instructions, is therefore a question in which third parties are in no way concerned, so long as he is known to them only in his discretionary capacity. While as respects the agent himself, obedience to orders is of primary importance; for if he acts contrary to them, he becomes liable to his principal for all losses that follow.

But where the authority is given in general terms, merely *to do* a certain thing; the manner of doing it is of course left to the agent's sound discretion, and he will not be responsible for any loss that may result so

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[1] A consignee, even though he have made advances on goods of his consignor beyond their value, is bound to obey instructions as to time of sale, and also as to price. 6 Cowen, 128. 6 Pa. L. Jour. 148. 3 Harris, (15 P. S. R.,) 234, 235.

[2] 15 East, 400, 408. (Where it is justly said, by Bayley, J., that it were a *fraud* on the public to hold otherwise.) 1 Meigs, Tenn. R. 502. 23 Wend. 22. 1 Metc. 202.

long as he acts in good faith and according to the best of his judgment. Thus, if an authority is communicated in general terms "to insure a certain cargo," and the agent act thereunder *bona fide*, and to the best of his judgment, the loss, if any ensue,—as from exceptions in the policy effected that might not have been contained in it had it been effected with a different insurer,—will fall on the principal and not on the agent.[1] So if a general authority is given "to get a bill discounted;"—the manner of doing it being left to his discretion and judgment;—the agent will have authority to indorse it, and to bind his employer thereby:[2] though if the authority be in terms "to get cash for the bill without indorsing it," the principal cannot be bound by the agent's indorsement.[3] It is needless, perhaps, to multiply illustrations of the principle, that, as between the immediate parties, the principal and the agent, *the authority is either general or special according as it is or is not confided to the agent's discretion, and*, as it cannot be absolutely either, but can be only relatively general or relatively special, *it will necessarily be construed in either case as intending to confer upon the agent the power of employing the proper mode and means of executing it.* Of this, therefore, one or two more illustrations will be taken as sufficient. Thus, again; an attorney at law, to whom is given a general authority to prosecute a suit on behalf of his client, is left to be guided by his own discretion, knowledge and skill, as to the mode and manner of conducting it

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[1] Cowp. 479.
[2] 4 T. R. (Durnf. & East,) 177.
[3] 3 T. R. Durnf. & East,) 757.

to a successful termination; and in this it is implied that his power will extend generally to the doing of every act that may properly be done in the prosecution of the suit or the settlement of the claim; and that, at the same time, if he fail to exercise such discretion, or employ such knowledge and skill, concerning the trust reposed in him, as he must be presumed, from the nature of his undertaking, calling and profession, to possess, he will be responsible for any damage thereby resulting to his client.[1] So if one give to another a general power *to settle accounts*, a power *to allow credits* is implied:[2] if *to sell and convey land*, a power is implied *to receive the purchase money*,[3] and also *to redeem the land when sold for taxes*;[4] if *to sell a horse*, or other thing, a power is implied to sell *in the usual way*,[5] and therefore even *to warrant* the horse or thing to be sold,[6] in every case where a warranty usually accompanies the sale.[7] But in all the foregoing instances, it has been supposed that the authority was given merely in general terms; if, on the other hand, similar powers are conferred, but, at the same time, accompanied with special instructions; as between the principal and the agent, they must be strictly pursued by the latter, or

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[1] With respect to attorneys, see Dunlap's Paley, 5 in notes, and 11 in notes. 2 Wils. 325. 4 Burr. 2061. 3 B. &. C. 799. See also Story's Agency § 24.

[2] 21 Wend. 279. Story, Ag. § 58.

[3] 6 Serg. & R. 149.

[4] 7 Watts, 487.

[5] 21 Wend. 279.

[6] 2 C. & M. 392. 4 Tyrwh. 164. Smith's M. L. 98, 99. Story, Ag. § 59.

[7] 9 Porter, 305. 1 Alabama, N. S. 446. 26 Maine, 84, 87. 23 Wend. 260. 6 Hill, 337. 6 Iredell, 252. 3 ibid. 349. 4 Gilman, 85. 10 Alabama, 386. 15 Vermont, 155. 2 McLean, 543, 544. 2 Murph. 119.

he will be held responsible; and even as between the principal and the third party, if the agent is employed only for the single transaction; or, in other words, is not known to the third party from other circumstances; those instructions must be pursued, or the principal will not be bound by the agents' acts.[1] In any case, if the agent exceeds his commission, or violates his trust in any manner, he renders himself responsible to his principal for the consequences; while if loss ensue from a violation of orders, it will furnish no defence to him that he intended the benefit of his principal,[2] and in no case will he be entitled to a profit that may result.

With respect to a *special* authority more particularly; although special powers,—powers communicated with specific instructions,—admit of no discretion (in so far as they are specially enumerated and defined,) and are therefore to be construed strictly; yet, if the *words* are of doubtful and uncertain meaning, and, with reasonable attention, will bear that interpretation on which the agent or both the agent and a third party shall have acted; the principal will be bound by that interpretation; although, upon a more refined and critical examination, judges learned in the law might regard a different construction as more proper and correct: for it cannot justly be expected of the people in general (for whose benefit the law is established and administered), that they should stop the course of business-life and activity to critically or nicely examine the various possible meanings of which a word or a phrase is sus-

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[1] See *post* tit. (2 ed.

[2] Dunlap's Paley, 3 and n.

ceptible; and therefore, with respect to instructions given by a principal to his agent, or a master to his servant, they will generally be construed by courts of justice as a man of common sense, attending reasonably to the language used, may have understood them.[1] If, however, clear, full, definite, and explicit instructions, are given to the agent, as to everything within the scope of his trust or employment; it is evident that but little is intended to be confided to his discretion; and that, therefore, he can have no right whatever, as against his principal, so to exercise his own judgment as to act contrary to them;[2]—unless, indeed, a case of urgent and unforeseen *necessity*[3] (an invariable exception to the rules of law[4]) should arise. As a strict consequence it follows, that his responsibility ceases when, but only when, he has performed the part intrusted to him in exact accordance with his instructions,—which are in general construed by the court with a great deal of strictness,[5] especially when the intention is clear and manifest.[6]

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[1] 12 Howard (U. S.), 358, 359. 8 Howard, 451, 469. 3 W. C. C. R. 151. 2 W. C. C. R. 132. 4 Barbour (S. C.), 369.

[2] 4 W. C. C. R. 551. 1 W. C. C. R. 454. 5 Mass. 36, 37.

[3] See conclusion of note (B) to Dunlap's Paley, p. 3.

[4] See Plowd. 1–21.

[5] 6 T. R. 591. Co. Litt. 258 b. 2 Ves. 644.

[6] 5 B. & A. 204; 628. 7 B. & C. 278. 1 Taunt. 347.—The courts are so far liberal, however, in construing authorities given to agents, that they will interpret them to include permission to use all necessary, or even usual means, of carrying the main intention of the principal into effect, according to the best manner (1 Camp. 43, n. 4 Camp. 163. 5 Bingh. 442. 1 M. & M. 450. 2 Camp. 555 and notes. 5 Esp. 75. 3 Esp. 65. 4 Esp. 116. 15 East, 400. 8 T. R. 531. Smith's M. L. 11 Ad. & Ell. 589. 6 Cowen, 354. 13 Wend. 520, 522. 21 Wend. 279. 23 Wend. 260).

When a letter or power of attorney is given in general terms, the

Chiefly from the nature and purpose of the trust confided, and of the authority communicated, is next to be determined—

(2c.) *The Character of the Agent.*

The agent's *character* is, of course, primarily determined, as between himself and his principal,—by precisely the same criterion as that by which the construction of his authority is determined; that is,—by the *purpose* of his appointment, as evidenced by the *authority* given. And therefore,—if we speak with precision,—just as formerly we said that every agent has, either a *general* or a *special authority;* so here we must say that every agent is, in the same (necessarily relative) sense, either a *general* or a *special* agent. The agent, then, is either a *general* or a *special* agent;—and this, as between himself and his principal, according to the construction formerly put upon his authority, and of the illustrations of the distinction (formerly given) between a *general* and a *special* power; that is to say, the agent is either *general* or *special*,—as between the principal and himself,[1] *according as the execution of the trust reposed in him is*, either *generally confided to his discretion*, or *specially limited by precise instructions as*

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extent of the power is to be settled by the language employed in the whole instrument (4 Moore, 448), aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question (8 Howard, U. S. 466). But when the acts to be done or covenants to be made are specified *eo nomine*, no question as to the extent of the power can arise to be settled by any court. (Id.)

[1] A different criterion exists as between the principal and third parties.

to everything within his authority.[1] And this being understood, it follows, that a *general* agent may be, at one and the same time, in the predicament of a *general* and of a *special* agent. For it is a right which the principal may exercise at any time before the execu-

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[1] As to the employment of the terms, *unlimited* or *limited*, *general* or *special*, with a view to distinguish between the same things, there is, perhaps, no very well founded objection: but *two* distinctions (unless the one shall be without a difference) there is not. The terms, *unqualified* and *qualified*, *unconditioned* and *conditioned*, *unrestricted* and *restricted*, with others signifying the relativity of more or less (i. e. degree), might possibly (but for the sake of uniform usage) be equally proper. In which connection, it may not be improper to remark, that the distinction between a *general* and a *special* authority as stated in the text above (and which I believe perfectly agrees with what has always been intended by the language of the reports), is, indeed, nearly identical with the distinction between an *unlimited* and *limited* power as stated by Mr. Paley (Agency, p. 1.); which latter, however, seems intended by Mr. Paley to indicate a difference other than that between a general and a special authority, for which other difference he cites no authority, and which,—(notwithstanding the invitation of the learned English editor (note (2) to p. 1 of that excellent work), to "see the distinction between a *general* and an *unlimited* authority pointed out by Lord Ellenborough in 15 East, 408;" and the suggestions of the learned American editor;)—as yet, I have been unable to find anywhere clearly recognized. (The remarks of Lord Ellenborough, referred to by Mr. Lloyd, not only fail to clearly 'point out the distinction,' but moreover seem professedly and intentionally directed to "the distinction between a *particular* and a *general* authority; the latter of which (" he incidentally and very properly adds ") does not import an unqualified authority:" which words, "unqualified authority" (taken in an absolute sense, but not otherwise), are supposed to have "pointed out the distinction between a *general* and an *unlimited* authority" (if the term general is, and the term unlimited is not, relative); a distinction which, nevertheless, is, if not without a difference, hardly established by a merely passing remark, and which, when established, will not be able to stand upon any other fonndation than that above stated (in the text) as the ground for the distinction between a general and a relatively special authority: so that, after all, it is a mere matter of choice between terms which, as distinguishing, shall indicate the recognized difference between a (relatively) general and a (relatively) special power.)

tion of the trust, to add to the agent's commission such private instructions as shall precisely define his power as to everything it comprehends. But, even though the principal may adopt such a course, it will not affect either his or his agent's relations to third parties;—it being, as formerly stated, a matter of indifference to them whether the agent has or has not private instructions, so long as he is always held out to them as a general agent;—while with respect to the agent himself, since as agent he can act only under the authority of his principal, if he receives private instructions (provided they do not require him to act contrary to the law[1]), he is, as between himself and his principal, bound to pursue them.[2] The *agent* may therefore be, *with respect to his principal a special, with regard to third parties a general* agent. To more clearly illustrate this, we have only to consider the case of an attorney employed to prosecute a suit, or of a factor empowered to buy or sell for another: in the one case, it is clear that if the attorney receive from his client private yet particular instructions as to terms of settlement with the adverse party, and afterward settle with that party for a less sum than he is by his instructions authorized to receive, he will bind his client, because of the *general* character in which he acts, and render himself responsible for violating his *special* instructions: in the other case, that of a factor, it is equally clear that if, while acting within the *general* scope of his authorized employment, he violates the *special* orders that he may receive from his principal, he will bind that principal by his acts, and

[1] 1 Bl. Com. 429.

[2] 3 Cranch, 415. Dunlap's Paley, p. 3, note (B).

render himself liable to answer any damage that may result. (Further and I doubt not ample illustrations will hereafter appear, when we have come to investigate the *rights* of the parties to the relation.[1])

The nature of the authority, and consequently the character of the agent, is also to be determined with reference to its source. Thus, since the authority may be conferred either by the *state* (as by an act of legislative power), or by *private* persons; agents are further distinguished as either for *public* or for *private* purposes; and therefore as either public or private agents (; in the broadest sense of which distinction, all officers of government are agents; though it would, indeed, seem very novel, and without doubt very improper, were we to consider their duties and rights under the title Agency).

Again; agents may be still further distinguished according to the differences between the relations in which they are authorized to act: and thus they may, perhaps, fall within the one or the other of two general classes,—known as,—the one, *attorneys at law;* the other, *mercantile agents;*—the former being such as represent the interests of parties in judicial proceedings; the latter, such as engage in mercantile pursuits on behalf of others. Of the former, however, it may be observed, that they are not simply the agents of those for whom they act: they are, indeed, with

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[1] We shall hereafter see, when we come to consider the rights of third parties in relation to the principal, that they will not be safe in taking the agent's mere assertion as evidence of the extent of his authority: if he has neither been accustomed to deal with them as a general agent to the extent of the business he assumes, nor has any sufficiently well evidenced commission to act upon his discretion, they will deal with him as a general agent altogether at their own peril.

respect to the courts in which admitted to practice, officers of the courts, sworn to certain duties as such, and, holding their office by the tenure of their fidelity and good behavior, are made responsible for their conduct to those courts; they are thus (in the first instance) publicly authorized and publicly responsible: and yet, since they cannot in general act on behalf of others without being first further authorized by those others so to act, and since they are thus also made further responsible to those who engage them; they should, perhaps, be regarded as partly public and partly private agents. While as to *mercantile agents*, since as such they incur no public duty or responsibility, they will constitute the great body of the class above designated as *private* agents, with the duties and rights of which, we are here principally concerned.

Finally; *mercantile* agents (, by far the most numerous class, who, in consequence of their various and complicated relations, give rise to the most frequent and important applications of the law of agency); are principally to be distinguished, as either, *intrusted with the possession and disposal of the property* of their principals; or as, simply, *intrusted with a power to negotiate contracts* for them:[1] of the former kind are, *factors*;[2]

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[1] See 2 B. & A. 137.

[2] A factor is one who has a general power (though it may, as to his principal, be limited by private instructions) to buy and sell according to the best of his judgment. (See Paley, Ag. 207.) He is distinguished from a broker, by being intrusted by others with the possession and disposal, and apparent ownership of property; and he is, generally, the correspondent of a foreign house. (2 Kent, Com. 622 note b.) He differs from a broker in some important particulars. A factor may buy and sell in his own name, as well as in the name of his principal. A broker, on the other hand, is always bound to buy and sell in the name of his principal. (See Story, Ag. § 34, and notes.)

and generally *all commission merchants*, whether acting under a *del credere* commission or otherwise; also *auctioneers*, and the like; of the latter, in general, are *brokers*.[1] Nor is this distinction, between those who *possess* property for the purposes of their trusts, and those who are employed simply to *negotiate* concerning it, altogether unimportant in the law of agency. For the general rule of law,—however clear or well established it may seem,[2]—that the *mere possession* of per-

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[1] A *broker* is one who is employed merely in the negotiation of mercantile contracts. He is not intrusted with the possession of goods, and does not act in his own name. (1 Domat, b. 1. tit. 17. sec. 1. art. 1. Story, Ag. 2d ed. 31, 34. 2 B. & Ald. 137, 143, 148.) His business consists in negotiating exchanges, or in buying and selling stocks and goods; but in modern times, the term includes persons who act as agents to buy and sell, and who charter ships and effect policies of insurance. (2 Kent, Com. 622 note b. See Dunlap's Paley, 13, in notes; and Index, tit. *Broker*. Also see Story, Ag. § 28.) An auctioneer,—who is a person authorized to sell goods or merchandise at public auction or sale for a recompense, or, as it is commonly called, a commission,—differs from a mere broker in two respects. A broker may buy, as well as sell; whereas an auctioneer can only sell. But a broker cannot sell at public auction, nor can an auctioneer sell at private sale. (2 H. Bl. 555.) The latter is primarily deemed the agent of the seller of the goods; but for certain purposes he is also deemed the agent of both parties. Thus, by knocking down the goods sold to the person, who is the highest bidder, and inserting his name in his book or memorandum, as such, he is considered as the agent of both parties; and the memorandum so made by him will bind both parties, as being a memorandum sufficiently signed by an agent of both parties within the statute of frauds. Before the knocking down of the goods he is, indeed, exclusively the agent of the seller; but after the knocking down, he becomes also the agent of the purchaser, and the latter is presumed to give him authority to write down his name as purchaser. (Story on Agency, § 27, and n.) As agent of the seller, he will of course render the seller responsible to third parties (purchasers) for any fraud committed by him in making sales,—as for fraudulent by-bidding, puffing, or bidding by himself to enhance the price. (See 8 Howard (U. S.), 134–162 —a very important authority as to the duties of auctioneers, and indeed an excellent commentary on the law relating to them.)

[2] See remark (by Le Blanc, J.) in 15 East, 38.

sonal property gives no right or title to dispose of it, must be understood either as inapplicable to agents (since in no case is theirs a mere or naked possession), or as subject to some very important exceptions;—as, for instance, the case of a factor disposing of his principal's property contrary to instructions;[1] or the case of a special agent intrusted with money, or current negotiable paper, and disposing of it to innocent third parties contrary to the special purpose for which delivered to him;[2] in either of which instances the principal will be bound by the acts of his agent.

Having now examined the modes of establishing the relation *as between the principal and the agent*, together with the considerations more immediately arising therefrom; we now proceed to consider its establishment

(2[b]) AS BETWEEN THE PRINCIPAL AND THIRD PARTIES.

The relation of agency, as between the principal and third parties, is established, according as it is *evidenced and made known* to them, either *by an express authority*, or *by the conduct of the principal*, or *by the usual business or employment of the agent. If by an express authority;* then the *terms* of that authority will of course, in the first instance, determine the character of the agent, as either general or special, in the manner that we have formerly seen. Thus, if those terms are general, the agent will, according to the generality of those terms, be a general agent, clothed with discretionary powers to bind his prin-

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[1] See post tit. (1[ec]).

[2] See Dunlap's Paley, 90 and notes. Also see post.

cipal; even though he be employed but for a single transaction: if, on the other hand, those terms are special or particular, the agent will, in just proportion to the speciality or particularity of those terms, be a special agent, having no discretionary or implied powers as to any thing involved in his agency.[1] *If by the conduct of the principal*, or *the usual business or employment of the agent;* then that conduct, or that business or employment, will determine the agent's character, according to the authority implied; for in such case the authority is (as between the principal and third parties) altogether implied.

It has indeed been said, that "a *special* agency properly exists, where there is a delegation of authority *to do a single act;* and that a *general* agency exists, where there is a delegation *to do all acts* connected with a particular business or employment."[2] But if so, the *criterion* of the agent's character as either general or special, is, not the generality or speciality of the authority itself given to the agent, but, *the generality or particularity of the business to be transacted.* Now we have just seen that the *usual business or employment* of the agent may, as between the principal and third parties, be a proper criterion of the agent's character; and we have formerly seen that, as between the principal and the agent, *the authority itself* will determine that character. The position just referred to must therefore be received with some qualifications. Thus, as to the *singleness* of the act to be done; in no case will that determine the *generality*

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[1] See above tit. (1[c]).

[2] Story, Ag. § 17.

or *speciality* of the agent's character.[1] While as to an authority 'to do all acts connected with a particular business or employment;' that may, as between the principal and third parties,—though it will not necessarily as between the principal and the agent, since private instructions may be added to it,—determine the character of the agent as general.[2]

In short, *as between the principal and third parties*, the true *criterion* by which the *character* of the agent, as *general* or *special*, will be determined, is *that by which his agency is evidenced and made known to them:* whether that be *a written instrument*, or *the conduct of the principal*, or *the agent's usual business or employment;*—though if evidenced to them only by that *conduct*, or that *business* or *employment*, the character of the agent will of course be general to some extent. Indeed, as respects third parties, a *usual* business or employment will evidence a general agency as to the extent of that business or employment: so the conduct of the principal, as in placing himself in certain relations, will evidence a general agency in proportion as the purport of that conduct is general. For examples; the business or employment of a factor, or of a broker, will usually evidence a general authority to act for the employer as factors, or brokers, generally

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[1] "To insure a cargo" (Cowp. 479); and "to get a bill discounted" (4 T. R. 177); are instances of a *general* authority. (See above tit. (1c).) The authority of the agent being limited to a *particular business*, does not make it *special;* it may be as *general* in regard to that, as if the range of it was unlimited. Nelson, C. J., in 21 Wend. 279.

[2] It would seem, indeed, that Mr. Justice Story himself, after having taken the above mentioned position at the outset, was inclined to entertain a doubt as to its validity when he came to touch upon the question of private instructions. See his Agency, § 73, and n. 3.

act: so the sending goods to an auctioneer's rooms (or to the business places of others who are engaged in similar capacities), will evidence a general authority to the auctioneer (or other person receiving the goods in a similar capacity) to dispose of them in the usual way of his business.

There is one way of establishing the relation of agency besides those that have been considered; viz. by adopting and confirming, *ex post facto*, the acts done in one's name by another acting without authority—whether they are done under the color of an established agency or by strangers. And here the general rule is, that, where one without authority act in the name of another, that other may, at his option, either adopt or repudiate such act;[1] that is, on condition that he either adopt or repudiate it altogether; for he cannot separate it, as by ratifying what is beneficial to himself merely, and rejecting the remainder.[2] This recognition or adoption may be either *express*, or *implied: express*, as by words spoken or in writing: *implied*, as from the conduct of the principal;—for instance, as by his receiving the benefit of the act and holding it after knowledge of the facts;[3] for this is sufficient evidence, in the absence of any other, to show that the act of the agent was by the principal himself regarded as his own; and the act being thus regarded as the act of the principal, the principal becomes chargeable with its legal consequences,—not

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[1] 13 East, 274. 2 M. & S. 485. 1 Bing. N. C. 198.

[2] 2 Str. 859. 1 Atk. 128. 1 B. N. P. 131. 7 B. & C. 310. 3 B. & Adol. 580. 4 Tyrwh. 486. Smith's M. L. 113.

[3] 2 Wood & M. 217. 8 Howard (U. S.), 134–162.

because he has received the benefit of the act, but because it is in law his act; for if it be shown by any other evidence that the act is his act, he will be equally responsible whether the act result in a benefit or a loss to him. It has indeed been held, that a ratification is equivalent to an original or a previous express authority:[1] but then, if the act could originally have been authorised only by writing, or by writing under seal, the recognition and confirmation must be made in the same manner;[2]—the rule being, as formerly seen, that the authority must be evidenced by such forms and solemnities as are legally necessary to evidence the act itself. Wherever writing would have been altogether unnecessary to the original appointment, long acquiescence, after knowledge of the act, without objection, and even the continued silence of the principal after notice of facts, will amount to a strong if not conclusive presumption of the ratification of an unauthorized act; especially when such acquiescence is not otherwise to be accounted for; or such silence is calculated to mislead third parties;[3] for it would be manifestly unjust if this right of adoption should be allowed to the principal, and third parties made to suffer while acting in good faith upon a strong presumption of his having exercised it.

A distinction should be noted, however, between the principal's right to adopt an act or a contract, by the adoption of which no injury can possibly result

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[1] 1 Watts & S. 106.

[2] See 1 Parsons, 89,—King, J.

[3] See 1 Parsons, 246, King, J. 4 Wash. C. C. R. 559. 6 Mass. 193. 17 Mass. 103. 1 Johns. Cas. 110. 2 Johns. Cas. 424.

to the third party; and his adoption of an act, the effect of which must be to raise a duty towards him from the third party, the non-performance of which duty will subject that party to damage: such an act as the last mentioned never can, if unauthorized at first, be confirmed by any recognition *ex post facto:* thus, a demand of payment in order to oust the debtor's plea of tender, or a demand of property in order to found an action of trover, must be made by an agent thereto *previously* authorized;[1] and the same rule seems to apply to a notice to quit, whatever might formerly have been taken to the contrary.[2] And in general where such previous authority is requisite, the party whom it is to affect may require to be properly satisfied of its having been given; nor is he bound to take the agent's bare assertion respecting it.[3] In other cases, that is, wherever no duty is to be raised on the part of third persons, an adoption of unauthorized acts *ex post facto* is generally sufficient —e. g., of an entry to avoid a fine.[4]

With more immediate reference to the unauthorized acts of those who in other respects are authorized agents; when the principal has been informed of what has been done, he must either dissent and give notice of such his dissent to the third party within reasonable time, or, in the absence of such dissent and notice thereof, be presumed to have assented to, and to have ratified the unauthorized act of his

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[1] 1 Esp. 83; 115. 1 Camp. 478. 5 Bing. 579.
[2] See Smith's Mercantile Law, 113.
[3] 1 Esp. 83. 7 East, 363.
[4] Co. Litt. 258 a.

agent.[1] This is principally to be taken with respect to a *general* agent. For, with respect to the unauthorized acts of a *special* agent, who is known only to third parties as such, the principal will not be bound by any act not specially authorized by the terms of the authority nor necessarily implied from the nature of the business undertaken.[2] It therefore behooves third parties to know for themselves, either by means of a written authority, or by special orders given to them by the principal, or from his conduct or the uniform employment in which the agent is engaged,

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[1] Dig. 14. 6. 16 —Ibid. 46. 3. 12. 4.—50. 17. 60. 1 Johns. Cas 110.—12 Johns. Rep. 300. 6 Mass. 193. 3 Mass. 70. 12 Mass. 60. 8 Pick. 9. 11 Louis. Rep. 286. 7 Martin, N. S. 143. 2 Kent, Com. 616. 14 Serg. & R. 30. 5 Barr. 333. 3 Harris (15 P. S. R.), 235.

I should suppose that *notice* always meant *reasonable* notice. In 14 Serg. & R., 27, however, Chief Justice *Gibson* says, "I take it to be indisputable that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own. He is bound to disavow it *the first moment the fact comes to his knowledge.*" Mr. Justice Rogers, commenting upon that authority, says (15 P. S. R. 235), "The case, be it remarked, was between principal and stranger; and, of course, calling for more stringent rules than where the contest is between the principal and his agent. In the latter, certainly he is not bound to act until he obtains the information necessary to enable him to act understandingly. Nor, although strong expressions are used, which, be it remarked, the case did not call for, would a principal, even as to a stranger, be bound to disavow the act until he had an opportunity of informing himself of all the facts and circumstances. Besides, whether he acted "promptly" would be a fact for the jury. But, however this may be as between principal and stranger, no such rule exists as between a consignor and his factor or agent. For if there be any point settled, it is, that between them, the principal is entitled to a reasonable time: he is not bound to answer until he has obtained sufficient information as to the state of accounts between them. The ratification, to bind, must be made with a full knowledge of all the facts and circumstances. (Story on Contracts, § 311, p. 209. Story on Agency, § 239, p. 234. 9 Peters' Rep. 608.)"

[2] See further on, tit. (2ed.)

or from previous dealings, whether the agent has or has not authority to the extent of the business he assumes in relation to them. If, indeed, they will take the agent's word for everything, if they will repose confidence in any and every one who may assume to act on behalf of others, they can charge no one but themselves with the consequences that may follow—and which will be apparent in another place.[1] In dealing with a *general* agent, who is well known to them, either from the nature of his business, or from usual employment, as having the *general* charge of the business he is engaged in, it will be entirely unnecessary for them to know anything of his private instructions; for in such case, his acts, so long as within the general scope of his business, will be obligatory upon his principal without regard to any private instructions given to such agent. In such case, as has already been seen, the agent may be, as to his *principal* a *special*, as to *third parties* a *general* agent.[2]

It has now been shown *how the relation of agency may be established*, both *as between the principal and the agent*, and *as between the principal and the third party;* and hence proceeding, we pass to the investigation of

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[1] See further on, tit. (2ed).

[2] It was, indeed, long since sufficiently intimated by Lord Ellenborough (in 15 East, 408), that even a *broker* having possession of goods to sell for his principal, might *not* be deemed a *general* agent, if he should carry out each order to a separate account with his principal, or should privately receive from his principal a limitation of the terms of sale.

(2ª.) The Rights of the Parties to the Relation.

The *parties* to the relation of agency are, as formerly stated, the *principal*, the *agent*, and the *third party*. The *rights* of any one party to a relation, are always the *duties* of the other party or parties. In considering the rights of one of the parties, therefore, we shall, at the same time, consider the duties of the others. And as these, on either hand, as subsequent to the establishment of the relation, are of course determined by the acts of the parties; so is it, therefore, as determined by their subsequent acts that we are hence to regard them. In order, then, the duties of the other parties respecting the principal will appear as—

(1ba.) The Rights of the Principal.

Since, according to what was just remarked, in considering the rights of the principal, we shall, at the same time, consider the duties of the agent and of the third party in relation to him; it follows, in the order of these, that the duties of the first, that is, of the agent, will be determined and presented as

(1ca.) *The Rights of the Principal in Relation to the Agent.*

In relation to the agent, the rights of the principal are, at least by all *civil* laws, chiefly defined with reference to some possible breach of duty on the part of the agent; and may therefore be said to have an immediate relation to one or another of those cases wherein some such breach of duty may at least be supposed. Accordingly, the rights of the principal, from the present point of view, will be examined with regard to, first

(1[d]), the *mode* or *manner* in which it is the duty of the agent to transact the business confided to him; secondly (2[d]), the duty of the agent *contracting* as such; and thirdly (3[d]), the duty of the agent as respects the rendering of an *account;*—each of which heads will be further subdivided, not only with a view to convenience, but also in order that the *particular points* to which attention is directed may be clearly indicated.

In order, then—

(1[d]).—The rights of the principal in relation to the agent *respecting the manner of transacting the business of the agency*, will be considered with reference to, first (1[e]), the *good-faith* and degree of *skill* required of the agent; secondly (2[e]), the *care* of the *principal's property;* thirdly (3[e]), the *usages* of *trade* and *laws* of the *place;* and, fourthly (4[e]), *sub-agents.*

(1[e]).—Respecting the *good-faith*, and the *degree of skill* (the exercise of which is inseparable from the duty of good-faith) required of the agent; it is a rule admitting of no exception, that *the strictest fidelity to, and the exercise of a degree of judgment and skill competent to the execution of, the trust assumed, must characterize the acts of every trustee.* The principal can be supposed to authorize, and the agent to undertake, neither more nor less than the fulfillment of the trust confided. It follows, therefore, that, while the agent will be held responsible to his principal for every infringement of, in no case can he act in a manner *adverse* to, that trust. Thus, in view of the adverse interests necessarily subsisting between a vendor and a vendee, an agent employed to sell, cannot become the purchaser;[1]

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[1] See Dunlap's Paley's Ag. 33, 34, 37, and notes.

and if he purchases the thing which he is employed to sell, the fact will in no way effect the relation previously thereto subsisting between himself and his principal;—unless, indeed, after fully communicating to his principal all the considerations that move him to do so, he shall obtain that principal's consent;[1] or, unless the court, after he shall have purchased, perceiving that the principal must lose by a re-sale, think proper on that account to uphold the transaction.[2] For the same reason, neither can an agent employed to purchase be himself the seller; unless there was between him and his principal a clear understanding to that effect;[3] while, on the other hand, if in any case, he purchase for himself, a thing which he was employed to buy for his principal, or any thing in which his employer has an interest or an estate, he will hold it only as trustee for his principal;[4] for in no case can he possess or set up any title, either in himself or a third party, adverse to that of his principal.[5] So carefully guarded, indeed, is the confidence necessarily reposed in the agent, that courts of equity frequently interfere to set aside improvident grants to him made

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[1] 13 Ves. 103. 8 Ves. 502. 9 Ves. 234. 12 Ves. 355. 3 Bro. C. C. 319.

[2] 4 Ves. 411. 5 Madd. 91. Dan. 301. 8 Price, 127. 8 Ves. 502. See 4 Cowen, 744. 2 Johns. Ch. Rep. 252, 259.

[3] 3 Ves. Jun. 217. 1 Ves. Jun. 289.

[4] 2 M. & K. 819. Smith's Mercantile L. 83. See also 9 Watts, 552. 6 Watts & S. 378. 2 Barr, 465, 466.

[5] 2 Barn. & Ald. 610. 2 Barn. & Cress. 540. 6 Bing. 743. 7 Bing. 339. 9 Bing. 378, and note. 4 Ad. & Ell. N. S. 511. 6 Ad. & Ell. 515. 10 Bing. 246. 24 Wend. 169. 10 Sim. 629. 9 Price, 269. 2 Camp. 243; 344. 1 Johns. Ch. Rep. 397. 4 Mann. & Gran. 1031. Dunlap's Paley's Ag. 10, note (k).

adversely to the principal's interests.[1] If the agent in any manner betray that trust, he is, moreover, deprived of his right to demand any remuneration; nor is his responsibility to his principal in such case confined to the loss of his commissions; it also extends to the amount of the damage which the principal sustains, either by direct injury occasioned to his property;[2] or by his being obliged to make reparation to third parties;[3] in which latter case, the measure of damages recoverable from the agent by the principal, will be the verdict against the principal obtained by the third party for the misconduct of his agent.[4] Where, however, the agent acts *bona fide* and to the best of his judgment, he will be responsible for no loss that may result from his acts;[5] nor will he be responsible for a breach of instructions where a compliance with them would have been a fraud upon third parties,[6] or where circumstances render a strict adherence to them impracticable,[7] or where an unforeseen necessity arises.[8]

With more particular reference to the *degree of skill*, for the exercise of which the agent will be responsible, it must, in general, be such as would, under ordinary circumstances, prove adequate to the

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[1] See Dunlap's Paley, 11 and note.

[2] 2 Moll. 327. Roll. Ab. 105. Cro. Jac. 265.

[3] Paley, Ag. 7.

[4] 4 T. R. 490. 1 Camp. 251. Holt. N. P. C. 139. 8 Taunt. 202.

[5] Cowp. 479.

[6] Cowp. 395.—Though in such case the fact that a compliance would have been a fraud, should be apparent upon the face of the instructions; otherwise, the answer, suggested by Mr. Lloyd in note (1) to Paley's Ag. p. 8, 'that the court will not permit a party to allege his own fraud,' may seem to apply.

[7] 4 Binney, 361.

[8] 1 Story's Rep. 51.

accomplishment of the service which he undertakes: for it is a general rule, applicable in all relations, that, *if any one undertake a service without possessing the degree of skill necessary to the proper performance of that service, he will be accounted a deceiver, and held liable for the consequences of his incapacity.*[1] The most satisfactory way of determining the question whether he have exercised a competent degree of skill, is to show by evidence whether a majority, or even moiety, out of a given number of skilful and experienced persons, would have performed the undertaking in the same manner:[2] it is a question that will, however, in every case, under the directions of the court, and in view of all the facts and circumstances shown upon the trial, properly remain a question for the jury to decide.[3]

(2e)—With respect to the *care of the principal's property;* the law requires of those agents who have property of their principals, that, without any particular directions, they exercise at least an ordinary or common degree of care and diligence respecting its safety and preservation.[4] It may therefore be the duty of an agent, especially of a factor, or of a commission-merchant, or of any consignee of goods, to *insure* the property intrusted to him; and it will certainly be so in the following cases:—1. Where the general usage of merchants requires insurance to be

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[1] 2 Wils. 325. 6 Conn. 442. 4 W. C. C. R. 310. 10 Barr, 108, 109.

[2] 10 Bing. 63. Smith's Mercantile L. 82.

[3] See 2 Add. & Ell. 256.—In general, *negligence* or *want of skill* is less a matter of law than of fact for a jury to determine.

[4] See Smith's Mercantile Law, 86. Dunlap's Paley, 15, 16, and notes.

made:[1] 2. Where, in the uniform course of previous dealings with his principal, the agent has been accustomed to insure:[2] 3. Where, even though he may not have been so accustomed, he has in possession property or effects of his principal sufficient to warrant the expenses of insurance:[3] 4. Where specially instructed or required to insure; as if he accept goods under a bill of lading containing a requisition to insure, for by accepting the goods under such requisition he agrees thereto.[4] And if, in any of the cases in which he is bound to insure, he neglects to do so, or does so in an improper or insufficient manner, he stands (by the judicially recognized custom of merchants) insurer himself; is, therefore, liable in the event of loss,[5] entitled to the premium, or to any defense which an insurer might have made.[6]

A further duty of the agent concerning the *care* of his principal's property, is, upon the importation or exportation of goods, to see that the proper entries are made, and the customs satisfied, at the customhouse. And therefore, if by reason of a false or imperfect entry,[7] or by being landed before the customs are paid or compounded,[8] the goods are forfeited, he is liable to answer for the loss:[9] unless, indeed, the entry accords

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[1] Story, Ag. § 190. 4 W. C. C. R. 315.

[2] 6 Binney, 308.

[3] 6 Binney, 308.

[4] 6 Binney, 308. Smith's Mercantile L. 87. 2 Kent, Com., 615, 616. Dunlap's Paley, 18 and notes. Livermore Ag. 324 to 326.

[5] See Dunlap's Paley, 18, 19, and notes.

[6] Ibid. 19 to 24, and notes. 2 W. C. C. R. 132; 203. 3 Binney, 204.

[7] Cro. Jac., 255; Cha. Ca., 25.

[8] 4 Bac. Ab., 599, tit. *Merchant*, B.

[9] Cro. Jac., 255.

with the invoice, or letter of advice; for then, though falsely or improperly made, it is not the agent's fault.[1]

With respect to his principal's funds, especially if he deposits them with his banker, it is his duty to keep them separate and distinct from his own personal accounts; if he places them to his general account with his banker, without any mark by which to distinguish them as belonging to his principal, and that banker fails, the agent will himself be liable.[2]

Where the agent either converts the property to his own use, or disposes of it contrary to his instructions, an action of *trover* may be maintained by the principal,[3] against the possessor (whether he be the agent or a third party); or, for misconduct, neglect, or disobedience of instructions, the remedy, as against the agent, may be either by *action on the case*, as for a wrong, or of *assumpsit* on the implied undertaking; in one or other of which actions, the principal may recover compensation in damages for the injury by him sustained.[4] Since the title to the property is in the principal, it is obvious that he may maintain trover, either where there has been a tortious disposition of the property, as a disposition contrary to express orders, or a demand and refusal while it was in the agent's possession.[5]

(3ᵉ)—With respect to the *usages* of *trade* and *laws*

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[1] Moll., 329. Paley's Ag., 24.

[2] 11 Ves. jun. 382. 3 Mad. 73. Paley's Ag. 47, and n. (l), 10 in n. (2).

[3] 21 Wend., 610. 8 Barr., 442.—See, as to remedies more particularly, in order to regain property withheld, or the produce if improperly disposed of, Dunlap's Paley, pp. 71, et seq.

[4] See Dunlap's Paley, 71 to 78.

[5] See 4 T. R., 260. Peake, N. P., 49. 21 Wend., 610, 614. 12 Johns., 300. Dunlap's Paley, 78 to 82.

of the *place*, as determining the duty of the agent respecting the *manner* of conducting the business; the general rule is, that, if one employs another in a particular transaction, trade or business, to act for him and on his behalf, the employer is presumed to authorize the employee to act in the manner which best accords with the *usages of trade*, and the *laws of the place*, as applicable to that business in which employed.[1] Accordingly; if one employs a broker, without giving him special instructions, the broker will be authorized to act, concerning the business intrusted to him, in accordance with the general usages and rules that govern brokers: nor is it, as respects the authority which the broker will have without special instructions, of any importance that the employer is himself ignorant of the rules by which brokers are governed:[2] for it is, indeed, not only a reasonable, but also a legal presumption, that every man knows the usages and customs of the place in which he traffics either by himself or his agent; and if such usages and customs are recognized as legal, he will of course be bound by them.[3] For the further illustration of all which, cases are not wanting. Thus, an agent to whom a bill of exchange, or promissory note, is sent for collection, and to whom no special instructions are given, is authorized (such being the usual course of business) to deposit it in a bank for collection, with a notary for protest, with an

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[1] See Dunlap's Paley, 4, 5, and notes. Chitty on Contracts, 203 and notes.

[2] 10 Ad. & Ell., 21.

[3] 7 Mass. Rep., 46.

attorney to be put in suit,[1] or to take in payment the acceptor's check, without being answerable in either case for the event.[2] Thus also, a factor, having no special instructions,[3] may sell goods on a reasonable credit, if it be usual or customary in his particular line of business to dispose of goods in that manner; though, as we have already seen, even a general agent who acts contrary to his private instructions will be personally liable to his principal; a factor, for instance, who sells goods on credit, contrary to the directions of his principal, becomes personally responsible to his principal for the entire amount or value of the goods sold;[4] nor can he, in such case, defend himself on the ground that it is the general usage or custom in his business to sell on credit—for neither law, usage, nor custom, can make a contract where there is none, or change a contract where there is one; though either may, where the terms of a contract are so general that room is left for the exercise of discretion, as regards the mode of performance, supply the place of clear and direct specifications.

What the usages or customs of each trade or business are, is the subject-matter of proof as occasions occur; unless they are such as have, by repeated proof, come to be recognized by the law; as those relating

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[1] 4 Rob. (La.,) Rep., 109.

[2] 6 T. R., 12. Dunlap's Paley, 45, 46. But see, 17 Mass. Rep., 108; and Smith's Mercantile L., 82; also the text (4ᵉ,) below;—as to the responsibility of agents for their sub-agents.

[3] It is borne in mind that we are here speaking of the duties of the agent to the principal, that therefore the question of private or special instructions (though, as between the principal and the third party, of no importance where the agency is a general one) is here very important.

[4] 4 Dall., 389.

to bills of exchange, notes, and some other known instruments of a commercial character. Though it has, indeed, been well observed, that, not every commercial practice of frequent use, or even of general convenience, is, or ought to become, in all its consequences, a part of the law of the land:[1] and on this ground it is, in part at least, that our courts,—uniformly holding to the doctrine that, of the two alternatives, it is assuredly better that the merchants should receive their law from the courts than that the courts should take theirs from the merchants,—have reserved to themselves the adjudication of the reasonableness of those usages and customs, and of allowing or disallowing them accordingly.

(4[e])—With respect to the appointment of *sub-agents;* in general, an agent has no right to delegate his trust, or leave its execution to another, without the consent of his principal—*delegata potestas non potest delegari.*[2] No man can change his agreements with others by his own acts merely: and therefore, an agent cannot delegate his employment to another so as to raise a privity between that other and his principal.[3] The consent of the principal may, however, in some cases, be implied; as from the nature, purpose, or character of the business;[4] or from the

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[1] See Abb. on Shipp., (6th ed.,) 472.

[2] See 2 Inst., 597. Co. 75, 76, 77 *b.* 2 Atk., 88. 2 Maule & Selw., 298; 303. 6 Taunt., 147. 26 Wend., 485. 9 Ves., 234; 251. 2 Kent Com., 633. 1 Salk., 96. 2 Roll. Rep., 393. 1 Camp., 88. 4 Camp., 183. 16 Ves., 27 .1 Hill, 501. 4 Mass., 522, 530; 595, 597. 12 Mass., 237, 241. 3 Ad. & Ell., N. S., 845.

[3] 2 M. & S., 299. 6 Taunt., 147, 148. 1 Livermore, Pr. & Ag., 64. Story, Ag., § 13.

[4] 3 Johns. Ch. Rep., 167, 178

fact that it is usual or customary in the employment undertaken by the agent,[1]—as may be collected from former statements.

It follows, of course, that agents are responsible to their principals, not only for the performance of their duties in their own persons, but also for the fidelity of those whom they themselves employ in the management of the business undertaken.[2] And even when they are expressly authorized to appoint sub-agents, it is still their duty to oversee their conduct, and when any thing appears to be wrong, to take the earliest steps to secure their principals from loss.[3]

In general, sub-agents stand in relation to their superiors or employers, as their superiors stand in relation to their principals; and are consequently obliged to the same duties and entitled to the same rights in relation to their superiors that their superiors are in relation to their principals. Thus, a sub-agent can claim his reward only at the hands of his immediate employer; and is, indeed, accountable only to that employer,[4] unless he have been a party to a breach of trust, for then the rule of equity applies, viz., that all the parties to a breach of trust are equally liable, and between them there is no primary liability.[5]

It is proper here to add,—what is an inevitable consequence of a former statement, that, though a party may be either one or several persons, indiffer-

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[1] See 11 Ad. & Ell., 589.
[2] See Smith's Mercantile L., 82.
[3] 17 Mass. Rep., 108.
[4] 1 Ves. jun., 292.
[5] 1 Mylne & K., 146. Smith's M. L., 82, 83.

ently, a *unity of interest and of action* must be apparent wherever any party is concerned,—that, if the party acting as agent be composed of many persons, they all must act with *unanimity:* and therefore, an authority to several persons to act jointly cannot be executed unless by all of them.[1]

We have now considered the rights of the principal, in relation to the agent, in so far as concerns the *mode* or *manner* of executing the trust: and next in order—

(2[i])—The rights of the principal in relation to the agent *respecting contracts* made by him, will be examined chiefly with reference to the duties of the agent, contracting, either (1[ea]) as a *general* agent, or (2[ea]) as a *special* agent.

(1[ea])—As a *general* agent, *contracting* for his principal, the agent will, as must be evident from former investigations, be held responsible to his principal for the strictest fidelity to his trust, and the exercise of his best judgment and discretion. An agent is a *general* agent, as has been seen, in as far, and only in so far, as he is clothed with *discretionary* powers. And consequently, if any act or thing whatever, pertaining to his employment, is left to his discretion, he is, as to that act or thing, a *general* agent; if as to any act or thing he has special instructions or particular directions, he is, as to that, and as between himself and his principal, a *special* agent.[2] It follows, that we cannot

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[1] Co. Litt., 112, *b.*; 181, *b.* 6 Johns., 39. 14 Johns., 553. 8 Cow., 544. 6 Mass., 46. 3 Pick., 244. 6 Pick., 198. 5 Binney, 484. 2 Johns., Ch. Rep., 19. 10 Peters, 564. 2 Littel's (Kent.) Rep., 115. Story, Bailm., § 202. Dunlap's Paley, 177 and notes. 4 Dall., 410. As to "where there are two or more principals, and two or more agents," see Story, Ag., §§ 38 to 45.

[2] This position has already been stated and illustrated by cases; under

consider the one absolutely apart from the other; but must regard the one as more or less general, the other as more or less special, according to the generality or speciality of his authority as evidenced by his commission, or by his uniform employment.

The agent is authorized, and assumes, to act only *for*, and under the *authority of*, his principal: and since the principal may, at any time before the execution of the trust, and by the same right under which he at first gave the authority, add to that authority any instructions he pleases, and may thus at will convert a general into a special agency,—as between himself and his agent at least;—it follows, that the agent, even though known to third parties as a *general* one, will be bound to execute his trust as a *special* agent,—i. e., as specially directed,—and this by the same obligation which he at first incurred upon assuming the part of an agent. As between himself and his principal, therefore, he will be personally liable upon every breach of his special or private instructions.[1] And thus, if he makes a contract, contrary to his special orders, whereby his principal sustains a loss, he will be liable to his principal to the extent of that loss;[2] while if any gain result, he will not be allowed to share it, but,—on the principle that the employer is entitled to both the increase of his own property and the benefit of the acts of his employee,—must account for it to his principal.[3]

(1ᶜ) and (2ᶜ). With respect to the rights of third parties, it will hereafter be again stated and further considered.

[1] 1 Yeates, 486.

[2] See 4 Camp., 184. 4 Dall. 389, 390. 1 Yeates, 486. 3 Harris, 229. 1 Beawes, L. M., 44, 46. Moll. 493, 497. 4 Com. Dig., 227–8. 2 Cha. Cas., 57. 4 Rob., 218. 1 Marsh., 206–7; 209, 210.

[3] 2 Wils., 325.

Where, however, an agent *unconsciously* exceeds his authority, as where from the *ambiguity* of his instructions he is left in doubt respecting his principal's wishes, he will be held less strictly liable,[1] and may even use his best discretion, according to the usages of trade:[2] and if his principal subsequently recognizes his departure from his instructions,—even impliedly, as by failing to notify him of the rejection of his unauthorized acts within a reasonable time after receiving intelligence of them,[3] or by receiving the benefit of an unauthorized act,[4]—he is altogether exonerated—according to the maxim, *omnis ratihabitio retro trahitur, et mandato priori æquiparatur.*[5]

In addition to the foregoing duties of a general agent contracting on behalf of his principal, other liabilities are in some instances expressly assumed by him. Thus, an agent for the sale of goods sometimes acts under a *del credere* commission;[6] that is, in consideration of a greater premium or reward than is usually given, he becomes personally responsible to his principal for the solvency of the vendee;[7] or, in other words, for the payment of the price of the goods

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[1] See 2 W. C. C. R., 132, 136. Also see above, pp. 18, 19.

[2] 1 Yeates, 486.

[3] See Dunlap's Paley, 31. 1 Livermore Pr. & Ag. 50. 1 B. & C. 186. 13 Mass. 363. 12 Johns. 300. 3 Cowen, 281. 3 Mass. 70. 12 Mass. 64. 8 Pick. 9. 10 Paige, 130. 3 Peters, 69, 81. 14 Serg. & R. 30. 4 Mason, 296.

[4] 2 Freem., 48. 1 B. & C., 186. Smith's Mercantile L., 82. See also above, tit. (2[b].)

[5] Co. Litt. 207, a. 258, a. Broom, Max. 380, 381.—On this important maxim, in its applications to actions of tort, see, 14 Jurist, 132; 3 Law Rep. (N. S.) 121. 5 Adol. & E. N. S. 143. 5 East, 491.

[6] See Smith's Mercantile L. 88.

[7] See 2 Kent, Com. 624 and notes. Chitty on Cont. 195 and notes.

sold; not in the first instance, for he is not himself the vendee, but only after the vendee has made default.[1] His undertaking is a part of his original contract; it consequently subsists entirely between his principal and himself; and does not, therefore, in any manner affect the relation either of his principal or of himself to third parties.[2] He has, indeed, his lien for the additional charges growing out of his extraordinary responsibility; but his power over the goods of his principal differs from that of other agents only in degree.[3]

(2ea)—As a *special* agent, contracting for his principal, the agent will, of course, be bound to the strictest fidelity to his orders. And though in this respect there is, *as between the principal and the agent*, no difference whatever between a *special* agent, and a *general* agent with *special* instructions,—that is, in as far as those special instructions go,[4]—yet, in speaking of a *special* agent, it is of course understood that we speak of one whose authority is more strictly defined than that of a *general* agent—though we may, perhaps, have also in view the great difference between them as regards third parties, and of which we shall hereafter speak. Thus, as between the principal and the agent, —though not as between the principal and third parties,—it is all one and the same, whether a princi-

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[1] See 6 Taunt. 519. 1 M. & S. 494. 4 M. & S. 566, 574. 5 Hill, 458. Paley's Ag. 111, n. (3) by Mr. Lloyd.

[2] 7 Pick. 220. 1 Cowen, 645. 4 Greenl. 542. 3 Mason, 232.

[3] 4 Maule & S., 566. 3 Mason, 232, 242. Chitty on Cont., 195 in note (2).

[4] See Story, Ag. § 73.—*Of whatever description* his authority may be, if he exceed it, and any loss ensue, that loss will fall on him. 4 Camp., 184.

pal authorize, either one whom he has been known commonly to employ in the capacity and whose business is that of an insurance broker, or one whom he has never before employed in any capacity, to effect an insurance for a stated sum on certain property with a certain insuring party, and the agent effect the insurance for a less sum or with a different party, and loss ensue; for in either case, the agent would, without doubt, be responsible to his principal for the loss;—though, as respects the insuring party, in the one case, the principal would, while in the other, he would not, be bound by the act of his agent.

The rights of the principal in relation to the agent respecting the *mode* or *manner* of *transacting* the business, and the *contracts* of the agent on behalf of the principal, having now been examined, next in order—

(3^{d})—The rights of the principal in relation to the agent, *respecting the agent's account*, will be considered with reference to, first (1^{eb}), *an immediate* or *superior* agent, and then (2^{eb}), *a sub-agent.*

(1^{eb})—With respect to an *immediate* or *superior* agent; the principal has a right to have of him an accurate and full *account* of all his transactions, disbursements, receipts and charges;[1] that is, wherever the nature of the employment is such as to require it. And in general, any neglect or culpable delay on the part of the agent to apprise his principal of his acts, will render the agent himself responsible for any loss that might have been avoided had timely notice been

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[1] See 8 Ves., 369, 371. 11 Ves., 855. 8 Ves. jun., 49. 14 Ves, 510. 1 Taunt., 572. 3 Russ., 393. 2 Edw. Ch. Rep., 16. 1 Mason, 119, 127. 17 Mass., 145. 3 Cowen, 437. 9 Pick., 387. Dunlap's Paley, 47, 48, and notes.

given: for instance, if an agent sells on credit to a person who becomes insolvent, and neglects to give his principal notice of the fact within reasonable time, he is liable for all the damage suffered by his principal in consequence of his neglect to give such notice.[1] The agent must not only keep a clear and accurate account of all his doings, but is also required to keep his principal well informed of the results as shown by that account;[2] in the statement of which, the principal will, in the absence of his own agreement to the contrary,[3] be entitled to all the increase arising from his property,[4] and to all the benefit of the acts of his agent; and therefore if the agent undertake another agency or employment during the continuance of the first, the principal will be entitled to all the earnings of the agent under his second engagement;[5] or if the agent makes interest on his principal's money, or unreasonably delays to inform his principal when money is received,[6] or uses it or mixes it with his own,[7] he will be obliged to pay interest to his principal for it;[8] and finally, when called upon to do so, he must pay over to his principal the balance of the account, even though he have incurred a contingent liability.[9]

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[1] 1 Story's Rep., 44. 4 Rawle, 223, 229. 6 Whart., 9. 9 Pick., 368. 4 Watts & S., 305. 6 Watts & S., 402; 529. 10 Barr., 104, 109.

[2] 8 Ves. jun., 49. 14 Ves., 510. 1 Taunt., 572. 13 Ves., 47. 15 Ves. 436. 9 Pick., 368.

[3] 8 Ves, 48. 11 Ves., 360. 10 Mod., 144.

[4] 1 P. Wms., 141. 2 Ves., jun., 317. 8 Ves., 72. 2 Mylne & K., 655. 3 Camp., 43. 3 M. & S., 562.

[5] 1 Camp., 529. 3 Camp., 43. Abb. on Shipp., par. 2, cap. 4.

[6] 9 Pick., 368.

[7] Paley, Ag., 49.

[8] 2 Esp., 704. Smith's Mercantile L., 85.

[9] 9 Watts, 130.

If, upon receiving the account, the principal is in any way dissatisfied with it, he must notify his agent of his objections within reasonable time. For it is the settled law merchant, that an account rendered is allowed, if it is not objected to without unnecessary delay.[1] The time within which objections must be made, cannot be definitely fixed. It depends upon the circumstances of the case:[2] and in view of those circumstances, the notice must be given within a reasonable time.[3]

If the agent neglects or refuses to account, then, in order to the protection of the rights of the principal in this matter, if he can prove the items of the account, *indebitatus assumpsit* will lie for the balance;[4] while if unable to prove the items without an account rendered, he may either maintain a special action against his agent for his breach of duty in refusing to account,[5] or seek relief in equity,[6] where he may have a discovery of books and papers and the benefit of the defendant's oath.[7]

(2^{eb})—With respect to an *inferior* or *sub-agent*, as formerly observed, he stands in relation to his superior

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[1] 3 Harris, (15 P. S. R.), 236.

[2] 7 Barr, 281.

[3] 4 Mass., 296. In 1 Peter's Rep., 46, it is ruled that when an agent does an act unauthorized by his orders, the principal is not bound to disavow it as soon as he is apprized of the circumstances. He has a right to deliberate. The principal has a *reasonable* time. See, 3 W. C. C. R., 151. 12 Johns. Rep., 300. 3 Cowen, 281. 1 Johns. Cases, 110. 15 Wend., 431. 17 Mass., 109. 1 Baldwin, 536. 13 Pa. Rep., 310. 7 Id., 281. 4 Mason, 296. 1 Peters' Dig., 156. 8 Eng. C. L., 54.

[4] 1 Marsh. 115. 5 Taunt. 431, 432 in note.

[5] Carth. 89. Salk. 9.

[6] 4 Madd. 373. See Willes, 404.

[7] Smith's Mercantile L. 86.—As to the legal and equitable remedies touching the agent's *account*, see fully Dunlap's Paley, pp. 55 to 71.

or employer as that superior or employer stands in relation to his principal. And consequently, all that has been said of the agent's accountability to his principal may be applied to a sub-agent as respects his accountability to his immediate employer. Thus, as on the one hand, the agent is accountable only to his principal, not to his inferior agent; so on the other, the sub-agent is accountable only to his immediate employer, not to his employer's principal.[1]

We have now examined the rights of the principal *in relation to the agent;* and hence pass to the consideration of—

(2ca)—*The Rights of the Principal in Relation to Third Parties.*

In relation to third parties, the rights of the principal are chiefly to be determined with reference to, first (1da), *contracts;* secondly (2da), *payments;* and thirdly (3da), *frauds and torts.*

In order—

(1da)—The rights of the principal in relation to third parties respecting *contracts* made with them by the agent, will be determined by the *character* of the agent, either (1ec) as *general*, or (2ec) as *special.*

(1ec)—The rights of the principal in relation to third parties, respecting *contracts of a general agent*, will mainly depend, not upon the private or special instructions that such agent may have, but upon whether in dealing with them, he shall have acted

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[1] 1 Ves. jun. 292. 10 Sim. 629. 5 Taunt. 447. 6 Taunt. 147. 3 Johns. Ch. Rep. 473; 574. 3 Barn. & Ad. 354. 4 Barn. & Ad. 375.—With respect to this important head, the *accountability* of agents, see Dunlap's Paley, 47 to 55 and notes.

within the scope of his general authority as evidenced to them either by a general commission or by a usual course of employment. If he shall not have so acted, the principal may, as we have seen, either adopt and ratify the agent's act or repudiate it altogether; and accordingly may, or may not, afterwards have a right to hold the third party to the transaction. Supposing, however, either that the agent shall have acted within the general scope of his authority, or that the principal shall have ratified his acts; the principal is bound to the third party, and the third party to the principal: in either of which cases, it is here proper to consider the principal's right to enforce the duty incurred by the third party contracting with the agent.

Upon the maxim, *Qui facit per alium facit per se*,[1] the contract of the agent is the contract of the principal; and therefore the principal may come forward and sue upon such contract, just as though it had been made with him personally; and this, indeed, whether the agent was a factor acting under a *del credere* commission,[2] or the principal, at the time of entering into the contract, was unknown and unsuspected, or the third person dealt with the agent supposing him to be the principal.[3]

The right of the principal to enforce contracts made by his agent, supposes, however, that the agent has acted in *good faith* with respect to the third party;—since it is an invariable rule that, *fraud will*, as to the

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[1] 4 Inst. 109. Co. Litt. 258a.

[2] 5 Watts & S. 9.

[3] Str. 1182. 1 Camp. 337. 1 M. & S. 579. S. C. 4 M. & S. 566. 5 M. & S. 390, 391. 10 B. & C. 671. 6 M. & S. 166.

party guilty of it, *vitiate any transaction tainted with it;* and as the acts of the agent are the acts of the principal, even though the principal have personally taken no part in them, any fraud of the agent in respect to the party dealing with him, will destroy the rights which otherwise the principal might have had against that party.[1] The right of the principal is, moreover, wisely subjected to the general rule, that, if the agent have dealt in his own name, the party having dealt with him as with a person acting for himself and on his own behalf, shall enjoy the same rights against the principal that he might have enjoyed against the agent himself if that agent had really been the principal.[2] Thus, where a factor, dealing for his principal but concealing that principal's name, deliver goods in his own name; the person contracting with him has a right to consider him as to all intents and purposes the principal; and though the principal himself may appear and bring an action on that contract, against the purchaser of the goods, yet, that purchaser is entitled to set-off any claim he may have against such factor in answer to that principal's demand.[3] This rule, it is said,[4] is to prevent the hardship under which a purchaser would labor, if, after having been induced by peculiar considerations,—such, for instance, as the consciousness of possessing a set-off,—to deal with one man, he could be turned over and made liable to another, to

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[1] 4 T. R. (Durnf. & East,) 39, 68.

[2] 1 Camp. 44. 5 B. & Adol. 393. 5 Tyrwh. 111. Smith's M. L. 114, 115.

[3] 7 T. R. 359, and 360 in notes. 2 Camp. 343. 4 B. & C. 551. 3 B. & Ad. 334.

[4] Smith's M. L. 114. 5 B. & Ad. 393. Id. 27.

whom those considerations would not apply, and with whom therefore he would not have willingly contracted. It would therefore seem to apply to the case of every one having transactions with an agent acting as principal, or for himself and in his own name: and thus to the case of one borrowing money of the agent acting as principal;[1] as also to other cases, for instance, where one of several partners is permitted to sell the partnership goods, and he sell them as his own, or a servant the goods of his master; notwithstanding they exceed their authority; for they, in the one case the co-partners, in the other the master, are bound; because, the sellers being intrusted with a general authority, it cannot be expected that the purchaser should be aware of any restrictions that limit it.[2] If, indeed, it come to the knowledge of the party dealing with the agent, before he have fully completed his contract, that the agent is not himself the principal, but the agent; then the reason of the rule does not apply; and *cessante ratione legis cessat ipsa lex.*[3] This knowledge of the third party may even be presumed in some cases; as where the agent is a *broker;* but not if a *factor:* for the latter, who belongs to a class of agents having the possession and apparent ownership of the property of their principals, differs, as has already been seen, very materially from the former, who, on the other hand, belongs to a class seldom if ever having even the possession of the property concerning which they are

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[1] But see Smith's M. L. 115.

[2] 10 Mod. 109. 2 Caine's Rep. 299. 24 Wend. 458.

[3] 1 East, 335. 2 Camp. 24. 7 T. R. 361.—As to this fundamental maxim, and its applications, see Broom's Legal Maxims, 68, 69.

employed to contract. And as every possessor and apparent owner is, in the absence of all knowledge to the contrary, reasonably presumed to be the owner; so in general, it is apprehended, the rule will or will not apply, according as the agent, being unknown as such and concealing his principal, is or is not the possessor and apparent owner of the goods he offers in his own name, and may or may not reasonably be presumed from the nature of his business to be acting for himself alone. And yet, by the common law, not even a *factor* could *pledge* the goods of his principal, so as to bind that principal by his act:[1] though this, at least in some of the States, is no longer an exception to the more equitable rule that the principal is bound by the acts of his general agent wherever innocent third parties would otherwise have to suffer.[2]

(2ec)—The rights of the principal in relation to third parties, respecting *contracts of a special agent*, will be determined more strictly with reference to the particular orders or special authority of such agent: since the principal's right to repudiate such contracts will depend, not, as in the former instance, upon whether in dealing with those parties the agent have acted within the scope of an authority evidenced either by the principal's conduct or by the usual course of a given

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[1] See Chitty on Cont. 204, 205 and n. Dunlap's Paley, 213 and n.

[2] Perhaps *equity* (wherever administered according to strict equity principles) would not fail to afford relief even against the rigor of the common law rule. Where a third party, acting in good faith and without notice, is induced (by the agent acting as principal or for himself) to make advances upon the thing delivered; upon what ground will a court of equity refuse to decree specific performance as against even the principal himself? or upon what ground refuse to enjoin him against proceeding at law?

employment or by a general commission, but, upon the *special orders* or *particular directions* given by the principal and constituting the *only* authority of the agent. For, *as respects third parties*, there can be no *special* agent where his authority is evidenced to them by either a *general commission* or a *usual employment:* in relation to them, the agent can be a *special* one only where his authority is *specially evidenced* or *particularly made known;* as where *special orders* or *directions* have been, not only given to the agent, but also, to them satisfactorily vouched; where, in consequence, they can have no right to deal with him as a *general* agent, and where, also in consequence, the principal may repudiate every act of the agent not particularly authorized. And therefore, if such agent make any other contract, or make any other disposition of his principal's property, than that which he is specially authorized to make,—as where a bill is given to him with special orders to get it discounted without indorsing it, and he indorse it for his employer;[1] or where goods are given to him to deliver to the purchaser, and he deliver them to another; in either case,—the principal may repudiate the transaction of his agent; and may, moreover, wherever his property is disposed of tortiously or contrary to the special directions given to such agent, proceed to recover it from the disponee.[2] Nor can the power of a *special* agent be enlarged[3] by reference to any thing else than

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[1] 3 T. R. 757.

[2] See 12 Mod. 514. 1 Camp. 258. 3 B. & A. 616. Smith's M. L. 116. 3 Pick. 495. 8 Greenl. 38. 11 Barbour (S. Ct.), 652. 22 Wend. 348.

[3] See above, pp. 12, 13.

his particular orders or special authority,—as by evidence of usage,[1] or the like,—since by nothing but those orders or that authority can it possibly be determined. And yet, as the authority may be more or less general or special, according to what has been already remarked, so even from the most extreme instance of a special authority, the agent's power may, by the conduct of the principal, but by no other means, be gradually enlarged or extended to a great degree of generality. To illustrate this, with respect to third parties; it is clear, from what has been said of the principal's right to *adopt* as his own the unauthorized acts of his agent, and which right subsists with equal force whether the agent is clothed with a general or special authority, that, by the often repeated exercise of that right, he may induce third parties to deal less strictly with reference to the *agent's special orders* than with regard to the *usual conduct of the principal in recognizing the agent's acts;* and that, in such case, third parties would thence have a right to look beyond the special character, in which the agent at first appeared, to the further and more general authority exercised by him and assented to (as necessarily presumed) by the principal: while, on the other hand, it is equally clear, that if the agent have been known to a third party only in a single transaction, in order to which, special orders were given; no authority can thence be presumed which will justify that third party in subsequently dealing with the agent as such, that is, in the absence of further special orders; so that the right of the principal to

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[1] 26 Wend. 192.

repudiate any further transactions of the special agent must remain, unless such transactions are further specially authorized; nor will the principal be bound, even by the acts of his *general* agent, where the third party, at the time of contracting, was, or ought to have been, aware of the limitations added to or imposed upon the agent's authority.

In conclusion of this consideration, it is proper to add, that the remarks under the preceding head, respecting the right of the principal to enforce contracts made by his agent, are equally applicable here; excepting, perhaps, those relating to the right of set-off which the third party may have in consequence of dealing with the agent as himself the principal—for it cannot well be presumed that a *special* agent will be able to conceal his principal from the third party, and it is, moreover, a general and an invariable rule that whoever deals with a special agent is bound to acquaint himself with the limitation and extent of the authority of such agent, and this at his own peril.[1]

(2[1a])—The rights of the principal in relation to third parties respecting *payment*, or *delivery*, to the agent, depend, in general, not upon whether the agent is *general* or *special*, but upon whether the agent is acting or not within the scope of the business in which employed. Since the act of the agent is the act of the principal, and the principal alone is entitled to the benefit of the agent's acts, it follows that a payment or delivery to or by the agent, is payment or

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[1] See Story on Contracts, § 134.

delivery to or by the principal.[1] And therefore, where the agent has paid away or delivered over his master's property on a consideration which fails, or otherwise under circumstances which entitle him to recover it back, the principal may, if he please, maintain an action *in his own name* to be reimbursed;[2]—which it will be often advisable to do, in this as in other cases, in order not to lose the agent's evidence;[3] in some cases, indeed, the principal may sue for this purpose where the agent could not; for instance, if the agent and a third person have joined in applying the principal's property to an unlawful purpose, as to the insurance of lottery-tickets; for though the agent, being *particeps criminis*, might not be able to recover, on account of the rule *pari delicto potior est conditio defendentis*, yet, that rule does not apply to a principal who is guilty of no criminality.[4]

The establishment of the principal's rights against third parties, is (as just suggested) facilitated by that rule of evidence which renders the agent a competent (if not always credible) witness in his principal's favor;[5] and which was long since established as an exception *ex necessitate* to the general canon of the old law, that, a witness having any interest in the event of the cause is incompetent.[6]

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[1] 4 East, 85. 1 Bl. Com. 430. 5 M. & W. 645. 3 B. & Ad. 23; 354. 8 T. R. 330. 2 Camp. 36. 3 Id. 254. 4 B. & C. 219.

[2] 1 Camp. 389. Dougl. 637. Cowp. 805. 5 Barr, (P. S. R.) 41.

[3] Smith's M. L. 116.

[4] Ibid. Also see Cowp. 197.

[5] 11 Mod. 226; 262. Wils. 40. 2 H. Bl. 591, 4 Ves. 474. B. N. P. 289.—As to the limits of this rule, which does not include agents acting out of the course of their usual employment, or agents for one particular transaction, see, 3 Camp. 317. 4 T. R. 589. 8 B. & C. 408.

[6] Now qualified in England, and in this country to some extent, by statutory enactments.

Payments made by third parties to an agent, will in general be good or not, according, as he is or is not authorized to receive them and receipt therefor. If he is usually intrusted to receive payments, and give receipts therefor, the principal will be bound: if his employment has been limited to other acts, his principal will not be bound by payments made to him.[1] But an agent employed to make, or negotiate, or conclude a contract, is not, as of course, to be treated as having an incidental authority to receive payments, which may become due under such contract.[2] Thus, an agent simply authorized to take a bond, is not to be deemed as of course entitled to receive payment of the money due under that bond.[3] His authority to do so may, however, be inferred from other incidental circumstances; as if he is intrusted with the continued possession of that bond, or is further specially authorized concerning it. And even though an agent be expressly authorized to receive payment; it does not thence follow that he may receive it in any way he chooses; but only that he may receive it in money or in the usual way: not that he may commute the debt for another thing, or compound, or release it upon a composition, or submit it to arbitration.[4]

In some cases, the authority of the agent to receive payments, may further depend upon whether the third party shall have been notified by the principal not to pay the agent. For if such notice shall have been

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[1] Story, Ag. § 92.

[2] 1 Salk. 157. 6 Serg. & R. 149. 2 Freem. R. 289. 1 Ch. Cas. 93. 6 Casey (30 P. S. R.), 513, 515.

[3] Story, Ag. § 98.

[4] Ibid. § 99 and authorities there cited; also § 181.

given before payment made, even though the agent might otherwise have been entitled to receive it, a payment to him will be no defense to an action by the principal against the third party.

(3da)—The rights of the principal in relation to third parties respecting *frauds* and *torts* committed by them, may be considered with reference to injuries arising either wholly or only partially from their misconduct.

If, on the one hand, in the sale of goods to an agent, the seller has been guilty of a gross fraud, the principal may maintain an action for any loss which he has sustained in consequence of that fraud. And so if a third person should wrongfully convert, or misuse, or injure the property of the principal, while it is in the possession of the agent, the principal may maintain an action in his own name against the wrongdoer for damages for that tort.[1] In many cases of an illegal conversion of the principal's property by a third party, as well as by his agent, the principal may have an election of remedy; as, for example, in the case of a tortious sale, he may waive the tort, and maintain an action for the proceeds of the sale; or he may bring trover against the wrongdoer.[2] Sometimes the one course is more desirable than the other; but it is so only when the interests of the principal may be enhanced thereby. Thus, if the wrongdoer has sold the goods of the principal for a

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[1] Story, Ag. § 438.

[2] Paley on Agency, by Lloyd, 172, 173, and note (n); Id. 324, 325, note (e). 10 East, 378, 394. Cowp. 197. Story, Ag. §§ 229, 230, 231; 439.

high price, it will be most favorable to the latter to pursue his remedy for the price or proceeds. But if the goods have been sold at an under value, then an action of trover would be the more beneficial remedy, as the principal would be entitled to recover the full price or value of the goods.[1]

On the other hand, when the injury proceeds from the wrong of the agent as well as of the third party, the agent and the third party are jointly, as well as severally, liable to the principal; and he may sue both or either of them.[2]

Next in order, let us examine

(2^{ba}) The Rights of the Agent.

As formerly remarked, the rights of one party in relation to others, are the duties of the others in relation to him. And therefore the duties of the principal in relation to the agent, as first in order, will here appear as

(1^{cb}) *The Rights of the Agent in Relation to the Principal.*

In relation to his principal, the rights of the agent respect either (1^{db}) his *commissions*, or (2^{db}) his *advances*, or (3^{db}) his *lien.*

In order, then—

(1^{db})—The rights of the agent in relation to his princi-

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[1] Story on Agency, § 439.

[2] 3 M. & S. 562. Smith's M. L. 75, 76. See also Dunlap's Paley, 341, 342.

pal respecting his *commissions*, depend (not upon his character as a general or special agent, but,) upon whether he shall have faithfully performed his undertaking. Supposing, then, that the agent shall have performed his duty;—notwithstanding that it may have resulted in no benefit, or even in a loss, to his principal;—he has a corresponding right to receive his remuneration, or, as often called, his commission; the amount of which is determined either by his contract with his principal, or by the usages of trade.[1] It must be understood, however, that his undertaking was legal; if otherwise, if he have executed an illegal undertaking, he not only can have no claim to a reward,[2]—since in such case it is impossible that he may have performed any duty,—but may, notwithstanding his authority, be held personally liable for any injury resulting to third parties from his acts. And even though he may have engaged in and performed a lawful undertaking, yet, he may have forfeited his claim to remuneration by misconduct in the management of his trust,[3] as where he shall have failed to render to his principal a faithful account,[4] or have been guilty of gross negligence or deficient in common skill,[5] *à fortiori* if he have betrayed his trust and have acted adversely to his principal.[6]

As the usages of trade may regulate the amount of the agent's commission, so it may, under certain

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[1] 3 Camp. 412. 4 Camp. 96. 2 Stark. 204; 225. 1 Holt, 412. 3 Stark. 361. 8 Bingh. 65.

[2] 2 Wils. 133. 3 B. & C. 639.

[3] See Dunlap's Paley, 7.

[4] 8 Ves. 371. 11 Ves. 355.

[5] 3 Camp. 451. 1 Stark. 113. 1 C. & P. 384. 7 Bingh. 569. 6 C. & P. 16. 9 Bingh. 287. 1 Tyrwh. 124.

[6] 3 Taunt. 32. 6 C. & P. 16, n. g. Smith's Mercantile L. 91.

circumstances, deny his right to any reward whatever; thus, for instance, if a ship-broker, at the request of a ship-owner, procure a charterer for his ship, unless the owner think proper to accept the charterer and conclude a charter-party with him, the broker can by the usages of trade claim no reward;[1]—and the law looks upon such usages, when reasonable, as incorporated into the contracts of merchants, since it cannot presume them to be ignorant of customs which they themselves have long established and observed.[2]

(2[db])—The rights of the agent in relation to the principal respecting *advances* made and *charges* incurred by the agent, depend upon whether or not such advances and charges shall have been *necessary in the regular course of his employment.* If they have been *proper* or *necessary* in the *execution of the trust*, the principal must be presumed to have impliedly authorized them; and therefore the agent will be entitled to charge them: such are charges for customs paid on imported articles, also charges for warehousing, porterage and the like.[3] If, on the other hand, they have been *unnecessary*, or made *out of the regular course of his business*, the agent will not, unless he shows circumstances from which his authority therefor is inferred, be entitled to repayment.[4] And, although entitled to his regular expenses, yet, if he conduct his business so negligently or unskilfully as to incur unusual or unnecessary charges, he will

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[1] 7 Bingh. 99. 10 B. & C. 438, 440. 4 C. & P. 289. See Dunlap's Paley, 106.

[2] Respecting *agent's commissions*, see Dunlap's Paley, 100 to 108.

[3] See Smith's Mercantile L. 91. Dunlap's Paley, 108.

[4] 5 Burr. 2727. 1 Camp. 88. 1 B. & Ad. 712. 8 T. R. 610. 1 T. R. 20; 113.

be allowed nothing on account of them.[1] When, however, acting in obedience to the orders of his principal, or in conformity with his instructions, he does an act which may turn out in the end to be wrong, but which he is induced by the principal's conduct to believe right, he is entitled to indemnity; for, though there can be no indemnity as between wrongdoers, yet, that rule applies only where the party seeking indemnity must have been conscious of his wrong in committing the act against the consequences of which he seeks protection or redress.[2] Finally, where the agent has faithfully discharged his duties, *all damages* that he may have sustained in the execution of his trust, or in consequence of the course of conduct which that trust imposed upon him, must be borne by his principal.[3]

(3[db])—The rights of the agent in relation to his principal respecting the *lien* he may have, upon property in his hands belonging to his principal, are such in general as the law allows in order properly to secure the reasonable charges and advances, not only of agents as such, but also of others employed to bestow labor upon or services about the things intrusted to them. And thus, in general, a *lien* may be defined as being a *security* effected by retaining or holding property, of which one is lawfully but without title possessed, till his just demands for work or services concerning it are satisfied by the owner. It is either *particular* or *general*.[4] A *particular* lien is a right to retain the *thing* itself in

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[1] 6 East, 392.
[2] 2 Ad. & Ell. 57. Smith's M. L. 93.
[3] 5 Binney, 450.
[4] 3 B. & P. 494.

respect of which the claim arises;[1] as for work or labor upon and expenses incurred about it. A *general* lien, on the other hand, differs chiefly in this, that it is not confined to the *thing* itself, but extends also to the *proceeds*, and is intended to secure, not merely a charge concerning the particular thing, but also the general balance of accounts due for services rendered in the course of similar dealings between the parties.[2] The latter, indeed,—being an extension of the former, not peculiarly favored by the law,[3]—is to be established only by the contract of the parties, or by that which operates as evidence of such contract,[4] namely, the usage of trade,[5] or by previous dealings between the parties on the footing of such right.[6] It would obviously be detrimental to the free course of trade, however, if mercantile agents, factors for instance, could not part with the possession of goods consigned to them,—and evidently they could not if they had only a particular lien,—without at the same time parting with the only effectual security they can have for the payment of such advances as they must necessarily make and such expenses and charges as they cannot but incur. And therefore a factor, or consignee, may have, not only a *particular* lien upon his principal's *goods* (in his possession) for charges arising on account of them; but also a *general* lien upon the *gross proceeds* of those goods,

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[1] 4 Burr. 2214, 2223. 1 Atk. 236. 7 East, 230.

[2] See Dunlap's Paley, 127 and n.

[3] 3 B. & P. 494.

[4] 6 T. R. 14.

[5] 7 East, 224.

[6] 1 Atk. 236. 4 Burr. 2221. 6 East, 28. 2 Chitty's Rep. 455. S. C. 3 Doug. 387. 5 Bing. N. C. 76. 2 Bing. N. C. 449. 1 Russ. & M. 719. 15 Mass. 394, 414. Dunlap's Paley, 127, 128, and notes.

for all such expenses as a prudent man would have found necessary in the management of the business, and for his commissions and the general balance of his accounts.[1] This right of lien extends to all the goods of the principal which have come into the possession of the agent in his character of factor:[2] and for all advances made or liabilities incurred, in the regular course of his business, it may be enforced as well by a purchasing as by a selling factor.[3] But such right of lien cannot exist where the factor, on receiving the goods, expressly stipulates to pay over all proceeds;[4]—for in such case it is expressly waived by his contract;—nor where the possession of goods is given without authority; as where a servant without authority delivers a chattel to a tradesman, or where a factor, having only an authority to sell, pledges the goods of his principal.[5]

Attorneys and solicitors, as well as factors, have a general lien, upon the papers of their clients in their possession, for the balance of their professional accounts: nor can a client legally demand his papers until he have paid all the reasonable charges of his attorney;[6] and this, as apprehended, notwithstanding it has been ruled[7] that an agent who is not a factor has no general lien.

So much for the *duties of the principal to the agent.* And now with respect to the *duties of third parties* in relation to him; they will of course appear as

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[1] 6 Greenl. 50. 2 Kent, Com. 640.

[2] Amb. 252. 1 Burr. 494. 6 T. R. 262. 3 Bos. & Pull. 489.

[3] 26 Wend. 367.

[4] 6 Term R. 258.

[5] 5 T. R. 604. 4 Esp. 174. 7 East, 5. 2 Kent, Com. 639.

[6] 2 Kent, 641.—See at large as to the *lien* of the agent, Dunlap's Paley, 127 to 154.

[7] 9 Watts, 130.

(2cb) *The Rights of the Agent in Relation to Third Parties.*

These are determined, by the acts of third parties in relation to the agent; either (1dc) by *contracts*, or (2dc) by *payments*, or (3dc) by *frauds* and *torts;* therefore in order—

(1dc)—The rights of the agent in relation to third parties as determined by *contracts* made with him, will chiefly depend upon whether or not he has, in his own right, any special *interest* or *property* in them. If he has *no interest* in a contract, he cannot, simply in his own name, sue upon it:[1] thus, neither the mayor of a city, contracting for the corporate body,[2] nor the treasurer of commissioners contracting for them,[3] nor a mere servant contracting for his master, can sue in his own name. On the other hand, the law is different, where the agent has some *beneficial interest*, in respect of his commissions or otherwise, or a *special property* in the *subject-matter* of the contract;—as in the case of a factor,[4] or of a carrier or warehouseman,[5] or of an auctioneer,[6] or other similar agent acting for a reward, or having a special property or interest and not being a mere servant;[7]—for, having such property or interest,

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[1] See Russel on Factors, 240. 4 Iredell, 257. 10 John. 387.

[2] 2 Taunt. 374.

[3] 3 B. & P. 147.

[4] 1 Atk. 245, 248. 3 B. & P. 485, 495. 4 Camp. 195. 2 Esp. 493. 5 Serg. & R. 27.

[5] 1 M. & Selw. 147.

[6] 1 H. Bl. 81. 7 Taunt. 237. S. C. 2 Marsh. 497, 501. 5 B. & Ald. 333. See 5 Serg. & R. 19.

[7] 2 C. & P. 49. 3 Camp. 320. 3 Stark. R. 147. 4 B. & C. 666. S. C. 7 D. & R. 144. 4 Bing. 2. Chitty on Cont. 213. Addison on Cont. 263 264.

he may sue in his own name; and this whether in contracting he professed to contract for himself or not.[1]

Although, in general, the agent sues as trustee for his principal, yet, there are cases in which he may proceed for his own benefit. Thus, a factor who has a lien for his balance on the price of goods sold by him, may maintain an action for that price against the buyer; and if he have previously notified that buyer not to pay the principal, a payment to that principal will be no defense to such action;[2]—otherwise, if the buyer have not been so notified;[3]—in one such case,[4] where notice had been given to the buyer not to pay the principal, even the buyer's claim of set-off, for money due him from the principal, was disallowed; but then, as was at the same time admitted,[5] great hardship might result were such the general rule; which fortunately it is not: the general rule is (and the only proper exception to it is, the case just mentioned, where the agent sues in his own right), that, *whatever would be a defense against the principal, will be a defense against the agent;*[6] and, indeed, unless the fundamental principle of the relation is to be overturned, the acts, declarations and admissions, of the principal, must be binding upon the agent, and, as proved, must be received in evidence against him.[7]

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[1] 1 Atk. 248. 2 Esp. 493. B. N. P. P. 130. 1 H. Bl. 81. 4 Camp. 195.

[2] Cowp. 255. 5 B. & Ald. 7; 27; 33.

[3] 7 Taunt. 237.

[4] 2 Esp. 493. See Cowp. 256.

[5] See remarks in 2 Esp. 493; and see also 7 Taunt. 243.

[6] Smith's M. L. 118.

[7] 1 M. & Rob. 138. 4 Tyrwh. 94. 11 East, 578. 1 Bingh. 45. 3 Camp. 465.

Thus, the agent may, as we have seen, sue upon contracts made by him on his principal's behalf: nor does his right in this respect, although in general subordinate to that of his principal, depend upon whether those contracts were made in his principal's name; but, as we have said, chiefly upon whether he has or has not any *interest* in them: though he may, indeed, sue upon *any* contract made with him *in his own name for an undisclosed principal*;[1] and if the contract be in form a *deed* to which the principal is not a party, he will, moreover, be the only person who can (as for the interest he represents) sue upon it; for it is an invariable rule of law that no person can sue on a deed unless he is a party to it.[2]

(2dc)—The rights of the agent in relation to third parties respecting *payments*, are, of course, in general, subordinate to those of the principal; though, as we have just seen, a factor, having a lien on the proceeds of goods sold by him, may demand of the purchaser that payment be made to him and not to his principal; and in such case it will afford no defense to the purchaser if payment be made to the principal and not to the agent.[3] In general, however, though a payment to him is good, his right to receive payment will depend either upon a question as to *notice* given by the principal to the third party respecting payment to him, or upon whether it fall *within the scope of his*

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[1] 5 B. & Ad. 393.

[2] 2 Inst. 673. 1 Lev. 235. 3 Id. 139, 140. 3 B. & P. 149 n. (*a*). 7 East, 148. 1 M. & S. 575. 6 Vin. Abr. Covenant, 374. 1 East, 501. 1 Chit. Pl. 3.

[3] Cowp. 255. See 5 Serg. & R. 27.

employment to receive payment. For, even where goods have been sold by a factor, the principal may take the collection into his own hands and maintain an action for the price in his own name.[1] (And here it may be incidentally suggested, that, for the third party, the safer course is, perhaps, to pay neither the principal nor the agent so long as there is any dispute between them as to which shall receive payment.) While if the receipt of payment is not *in the usual and customary course of his business*, or is effected under circumstances fairly giving rise to the presumption that the agent was acting *mala fide*, and received the money with the intent to appropriate it to his own use in fraud of his principal, it is not valid.[2]

(3dc)—The rights of the agent in relation to third parties, as determined by *frauds* and *torts* committed by them, are also subordinate to those of the principal. As we have seen, *fraud* will, as to the party guilty of it, vitiate any transaction tainted by it.[3] And consequently, if the third party in dealing with the agent have been guilty of fraud or deceit, the agent may, if he can protect himself by so doing, reject the transaction tainted by the fraud; or, if he have suffered by it, maintain an action upon the deceit for damages sustained.[4] And as against third parties or strangers, he may, without doubt, maintain an action

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[1] 5 Serg. & R. 27.—Nor is there any distinction in this respect between the case of an auctioneer, licensed under the Acts of Assembly, and that of a common factor. (Id. 19, where the case of Willing v. Rowland, cited in 4 D. 106 in note, and also in 3 Y. 342, was overruled.

[2] Addison on Contracts, 1108. 6 Casey (30 P. S. R.) 513, 515.

[3] 4 T. R. 39, 68.

[4] See Story, Agency, § 415.

for any tort or injury by them done to the property in his possession belonging to his principal.[1]

We have now considered the *rights* of the *principal* and of the *agent;* their *duties*, next in order, as determined by their relations to others, will appear as

(3ba) The Rights of Third Parties.

These of course arise either in relation to the *principal* or in relation to the agent: as arising in relation to the *former*, they are further to be defined and considered as

(1cc) *The Rights of Third Parties in Relation to the Principal.*

In relation to the *principal*, then, the rights of third parties will be determined—just as formerly the rights of the principal in relation to them were determined—either (1dd) by *contracts*, or (2dd) by *payments*, or (3dd) by *frauds* and *torts*. Thus in order—

(1dd)—The rights of third parties in relation to the principal respecting *contracts* made with them through the agent, are also further to be determined by the *character* of the agent, as either (1ed) *general* or (2ed) *special*. And hence—

(1ed)—The rights of third parties, in relation to the principal, *on contracts of a general agent*, will of course, as is evident from what has already been seen, depend less upon any special instructions he may have (though they may operate as between himself and his principal to make him a special agent) than the general charac-

[1] 1 H. Bl. 81. 3 Camp. 320.

ter in which he is known to such third parties.[1] Thus, if a servant or agent be accredited and invested by his master or principal with authority to act for him in all his business of a particular kind;—for, as we have seen, the fact that the authority of the agent is limited to a particular business, has nothing whatever to do with the determination of his character as general or special;[2]—or, if the agent, being himself engaged in a particular trade or business, be employed by the principal to do certain things for him in that trade or business; he will, in either case, be deemed, with respect to his employment as agent, a *general* agent:[3] and as the public generally can have no means of knowing, either what acts are, in any particular case, within the general scope of the agent's authority; or the wishes and directions of the principal; the latter will be liable, without regard to whether his orders have or have not been violated.[4] In such cases, the principal, having for his own convenience induced third parties to consider his agent as possessed of *general* powers, is bound by the exercise of such powers by that agent in relation to those third parties, even though in direct violation of *special* or *private* instructions given to him.[5]

The *authority* of the agent may, as formerly stated, be either *expressly* given, or it may be *implied* or *inferred* from the conduct of the principal. If *expressly* given,

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[1] Chitty on Cont. 199.

[2] 21 Wend. 279.

[3] Russell on Factors, 75.

[4] 12 M. & W. 545. 1 Metc. 193. 10 N. Hamp. 550, 551. 17 Mass. 98. 6 Howard (Miss.), 217–221. 9 Porter, 428, 432. 7 Missouri, 318. 12 Verm. 130, 138. 5 Conn. 71, 74. 22 Wend. 348. 3 Smedes & M. 609. Chitty on Cont. 199 and notes.

[5] 15 East, 408. 10 Mod. 109. 11 Mod. 8. 1 Esp. 111.

there can of course be little doubt as to its extent; except, perhaps, from the ambiguity of the terms employed;[1] in which case, both the agent and the third party will be entitled to the benefit of that ambiguity.[2] On the other hand, when the *authority* of the agent is evidenced by or inferred from the conduct of the principal; as by his employment of the agent; that conduct necessarily furnishes the only proper evidence of its extent as well as of its existence: and therefore, in solving all questions upon this point, the general rule here is, that *the extent of the agent's authority* (as between his principal and third parties) *is to be measured by the character and extent of his usual employment*:[3] nor is there aught but justice in this; since, as above stated, he who accredits another by employing him, ought to abide by the effects of that credit, and by contracts made with innocent third parties, in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorize them or not;[4] and this, it is said,[5] on the principle that, where one of two innocent persons must suffer by the fraud of a third, the one who enabled that third person to commit the fraud ought to be the sufferer (though the same doctrine is, without doubt, deducible from the principle that the acts of the agent are the acts of his employer).

The same rule is applied respecting bills and notes,

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[1] 7 B. & C. 278.

[2] 1 W. C. C. R. 454. 2 Id. 132. 3 Id. 151. 12 Howard (U. S.), 358, 359. 8 Id. 451, 469. 4 Barbour (S. Ct.), 369.

[3] Smith's M. L. 93–94.

[4] 15 East, 38; 400. 3 Esp. 60. 4 Camp. 88. 2 Stark. 368. 10 Mod. 111. Moll. 288.—And references in note [4] on preceding page.

[5] Smith's M. L. 94.

which, if drawn, indorsed, or accepted, by a clerk who has previously been allowed to do so, bind the principal, or employer, even though the money has never come to his use;[1] it is also applied to sales,[2] and to guarantees,[3] in a word, to every species of mercantile transaction, and whether the agent have or have not been dismissed from his employer's service, provided the third party had no reason to be aware of the determination of his employment,[4] which has occasioned the prudent suggestion of the propriety of giving public notice whenever a mercantile agency is determined, as is the practice on the dissolution of partnerships. Nor can the principal avoid this responsibility by agreeing with the agent that the latter shall take it upon himself: for others, being neither parties to nor cognizant of such agreement, cannot be bound by it.[5] In view of all which, is again called to mind the rule above stated; that, as between the principal and third parties (it being no rule at all as between the principal and the agent), *the extent of the agent's authority is to be measured by the character and extent of his usual employment:* for the fact that the agent has authority in his proper or usual employment, cannot, in any case, be construed to extend his authority to things unconnected with that employment: and therefore, though a clerk or an apprentice may have an implied authority to receive money for his master, if it have been usual in the course

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[1] 9 Bingh. 21. 3 Esp. 60. 4 Camp. 88. 12 Mod. 346. Molloy, 107. 5 B. & Ad. 674.

[2] 13 East, 38.

[3] 2 Stark. 368.

[4] 10 Mod. 111. 12 Mod. 346. Molloy, 107; 282.

[5] 1 Esp. 350. Cowp. 636. 1 Camp. 85. 12 Wheat. 40.

of his business for him to do so; yet, that will give him no authority to receive it in collateral transactions, or upon an arrangement made with him out of the regular course of his business:[1] for the same reason also, though a ship-master, when abroad, has an implied authority to borrow money for the purposes of the ship, and may therefore bind the ship-owner, by contracting a loan for those purposes; yet, if he borrow money on his own account, even though he afterwards apply it to the purposes of the ship, that will be no exercise of his authority as master, and the owner of the ship will consequently not be bound to pay that money to the lender.[2]

It is here proper to observe, however, that, where the authority of the agent is sought to be established as necessarily implied by the relations and conduct of the parties principal and agent, the nature and purpose of the authority to be inferred, the character of the employment which it contemplates, and the sufficiency of the acts of the parties to raise such inference, must be considered with respect to each particular case, as involving questions proper for the jury before whom it may be presented.[3]

Sometimes it happens that a *general* agent, a *broker* or *factor* for instance, *contracts in his own name*, either, *without at all disclosing the fact that he is an agent*, or, if disclosing that fact, *without naming the party for whom he acts:* in either case; the agent is the only person

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[1] 2 Cr. & Mee. 312. Smith's M. L. 96. 6 Casey (30 P. S. R.), 513, 515.

[2] 1 M. & Rob. 79.

[3] See 3 B. & C. 38, 1 Str. 506. 1 R. & M. 217; 226. 2 Stark. 204. Peake, 41. 3 Sal. 234. 5 Esp. 76. 5 B. & Ad. 647. Smith's M. L. 95, 96.

with whom the third party deals; if upon the credit of that person, the only one to whom he gives credit: and yet,—notwithstanding the fundamental rule, that an agent can bind his principal only by acting *in the name* of that principal,[1]—if a person sells goods, supposing at the time that he is dealing with a principal, but afterwards discovers that the person with whom he dealt was not the principal in the transaction, but the agent, though he may in the meantime have debited the agent, he may afterwards recover the amount from the real principal;[2] and so he may do if the agent, at the time of making the purchase, stated himself to be an agent, but omitted to state the name of his principal, which is afterwards discovered.[3] The right of the third party in this respect,—a sort of set-off, perhaps, against the principal's right to adopt, *ex post facto*, the acts of an unauthorized agent,—is to be understood, however, as subject to one qualification; namely; that, if he as the vendor shall have suffered the time of payment to elapse, and the principal to alter (by his dealings) the state of his accounts with his agent, so that the principal must be the loser if called upon to pay the vendor,[4] then, in such case, sooner than that the principal (who is in no wrong) shall suffer, the vendor shall be deemed to have

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[1] 1 Str. 705. 2 East, 142. 11 Mass. 26, 29. 5 Peters, 318. 8 Peters, 165. 19 Johns. 568. 10 Wend. 88. 23 Wend. 435. 6 Pick. 203. 16 Pick. 347. 11 Serg. &. R. 129. 8 Wheat. 174.

[2] See 15 East, 67. 4 Taunt. 516, n.; 576, n. 7 Taunt. 295. 10 B. & C. 671. 3 Dougl. 410. 2 Metc. 319. 24 Pick. 13. Dunlap's Paley, 247 and n. Chitty on Cont. 206. Smith's M. L. 103.

[3] 9 B. & C. 78; 86. 7 C. B. 21, 34.

[4] See (instances where such alterations have been deemed material), 9 B. & C. 449. 3 East, 147.

elected the agent for his debtor.[1] Indeed, in any case that may arise, if the third party have *preferred* the credit of the agent to that of the principal, and have *agreed* with the agent to accept him as his debtor;[2] or if, in other words, at the time of the sale, the seller knew, not only that the person, nominally dealing with him as principal, was acting as agent, but also knew who the principal really was, and notwithstanding all that knowledge, chose to make the agent his debtor, and to deal with him and him alone; such third party will not be permitted on the failure of the agent, to turn round and charge the principal, after having once made his election, and this at the time when he had the right of choosing between the one and the other.[3] In such case, the agent stands, in relation to the third party, by agreement between them, as a principal, that is, as one acting *for himself* alone and upon his own responsibility; and the true ground upon which the third party is in any case permitted to charge some other one than the immediate party with whom he deals, is,—not, as is sometimes said, that this other derives the benefit of the transaction (for this, though an equitable ground in many, is a remote one in all cases, and while unnecessary to the liability of a principal, since the transaction may result in a loss to him without affecting that liability, is naturally and necessarily involved in other relation of parties), but,—

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[1] 1 Camp. 109. 7 C. B. 21, 35, 36.

[2] Smith's M. L. 103.

[3] 4 Taunt. 574. 15 East, 62. 6 Har. & Johns. 171. 1 Ala. N. S. 299. 24 Pick. 13. 11 Ala. 1058. 4 Harring. 130. 9 Humph. 643. 10 Metc. 169. 6 Greenl. 220. 8 Metc. 411. 9 Barbour (S. Ct.) 150. 4 W. C. C. 567. Chitty on Cont. 207 and n.

that one of the immediate parties to the transaction is in fact acting *for* (and therefore called the agent of) *another*, and that his act is, consequently, not his own but that of his principal; as between whom and third parties at least, the maxim '*qui facit per alium facit per se*' is the groundwork of the whole relation. And therefore the rule which prevents the vendor, in the case last above mentioned, from resorting to the principal for payment, does not apply to the cases previously mentioned;—where, either the principal's name is unknown to the third party, notwithstanding that the third party may have the means of knowing it; or the agent conceals the fact of his agency;—but is confined to cases where he has actual knowledge of the principal,[1] and notwithstanding that knowledge, actually charges the agent.

(2ed)—Our attention is now directed to the rights of third parties, in relation to the principal, as determined by *contracts with a special agent.*

Cases may indeed arise, *ultimæ necessitatis*, in which the agent, however restricted the terms of his authority may be, should actually exceed his special orders or assume a new authority, for the purpose of rendering available to his principal the subject-matter of his trust, and especially for the preservation of his principal's property.[2] It is certainly a precept of reason and of common sense, and it may even from the cases be collected as a general rule, that where the nature of the trust necessarily demands the exercise of discretion, the exercise of the discretion demanded will

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[1] 2 Esp. 567. 2 Metc. 319. 3 Hill (N. Y.), 72. 29 Maine, 439.

[2] See Story, Bailm. § 455. 1 Story's Rep. 43. 7 Metc. 556. 11 Mees. & Wels. 535. 5 Johns. 395. See also Story's Agency, § 85.

bind the principal, and excuse the agent from all personal liability.

But where the nature of the trust demands the exercise of no discretion, and the agent is employed only for a particular purpose, with a view to the accomplishment of which he has special and positive instructions,—or, in a word, is a *special* agent,—the principal will be bound by his acts only on condition that they fall within the scope of his authority as by those instructions specially defined:[1]—a condition that makes the general rule, respecting the liability of the principal in this case, directly the reverse of that laid down respecting his liability in the former. It consequently becomes the duty of third parties dealing with an agent, to ascertain, at their own peril, the extent of his authority,[2] as whether he is a general or a special agent,—that is, whether his authority to act on behalf of his employer is, to the extent of the business he assumes to do in that employer's name, a *general* authority and direction *to do* that business,—

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[1] For so evident a proposition, one or two cases ought to be sufficient authority perhaps; for references, however, see—3 T. R. 757; 762. 1 Esp. 111. 2 Str. 1178. 5 T. R. 604. 5 Ves. 211. 7 East, 5. 1 Maule & S. 140. 2 Brod. & Bing. 639. 3 Call. Rep. 207. 2 Mass. 398. 1 Mason, 440. 15 Johns. 44. 18 Johns. 363. 3 Conn. 171, 172. 6 Cowen, 324, 354. 1 Cowen, 645; 668. 6 Cushing, 123. 3 Peters, (U. S.) 428. 8 Wend. 494. 2 Harr. & Johns. 396. 17 Mass. 1; 479. 1 Pick. 215. 9 Pick. 542. 4 Watts, 222. 5 Yeager, 71. 3 Hill, 279, 281. 1 W. C. C. R. 174. 1 Metc. 201. 6 Smedes & M. (Miss.) 367. 9 Porter, 216. 1 Hoff. Ch. R. 166; 360, 368. Ware, 181. 6 Verm. 234. 4 W. C. C. R. 311. 2 Harris, (P. S. R.) 105. 2 Jones, (P. S. R.) 258. 1 Parsons, 246.

[2] 4 T. R. 177. 1 Y. & J. 457. 7 Ves. 276. 1 Esp. 111. 2 C. & M. 391. 1 Metc. 201, 202. 9 Pick. 542. 9 Porter, 210. 10 N. Hamp. 538, 547. 1 Peters (U. S.), 264. 26 Wend, 193. 2 Hill, 159. 3 Hill, 263, 266. 5 Mass., 11, 37. 3 Metc., 9, 18. 5 Watts & S., 548. 6 Howard (Miss.), 345. 29 Maine, 404.

as "*to sell*,"—or a *special* authority, as "to sell *for cash and without warranty*."[1] And it has even been held, in direct terms, that a party who would avail himself of the acts of an alleged agent, must, in order to charge the principal, *prove* the authority under which the agent acted.[2] Nor can the strictness of the law in this respect be reproached with injustice towards third parties; for it is not only impossible that the principal himself should be able to prevent the agent from acting in bad faith and in violation of his authority, but it is always to be presumed that where one deals with another, he knows with whom and upon what basis he deals; especially is it so to be presumed in the case of a third party dealing with an agent whose *character* as such is *unknown* to that party, as it cannot but be in the absence of previous dealings or other circumstances tending to establish that character.

The preceding statement may, however, admit of some qualification with respect to an agent having possession of certain kinds of property, the possession of which is, *prima facie* at least, inseparable from the presumption of ownership; as *money*, *negotiable instruments* and the like. For, if the owner will intrust them to dishonest persons, it is but just that he alone, if any one, should suffer by their knavery; and that innocent third persons should be safe in acting upon a presumption which is not only natural and necessary, but is also one of law.[3] Thus, with regard to *money*,

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[1] See, above, tit. (1[c]).

[2] 7 Watts, 524. 4 Casey (28 P. S. R.), 505.

[3] 12 Harris (24 P. S. R.), 217. Possession of personal property is presumptive evidence of ownership; and the burden of proof is on him who alleges the contrary.

also *negotiable paper* (*bills* and *notes* negotiable on their face and the title to which is transferable by delivery), possession and property go together and carry with them by necessary implication a disposing power:[1] and therefore, the disposal thereof, even by a *special* agent acting contrary to or in violation of his authority, must be excepted from the rule above stated. Upon the same principle,—and also because he is a *general* agent,—a factor may pledge the negotiable-paper of his principal as security for his own debts, and his principal will be bound thereby; unless he can charge the party taking it with knowledge of the fraud, or with notice of his own title.[2]

It is, as we have seen, a fundamental rule,—often stated in the books, and in very general terms,—that an agent must act, if at all, *in the name* of his principal; or, if he does not,—as if he sign a contract in his own name, and not as agent, or if he make a contract which does not show on its face that he acted as agent,—he binds *himself* only, and not his principal.[3] But this, although a fundamental rule, is not applied indiscriminately to all agents; nor to all the acts of any class of agents. It is applied chiefly to *special* agents, and to certain acts of other agents capable of being legally evidenced only by writing, under seal or otherwise.

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[1] See 2 Kent, Com., 626; and more fully, Dunlap's Paley, 234 to 239 and notes.

[2] 1 Bos. & Pull., 648. 8 Taunt., 100.

[3] See 1 Str., 705. 2 East., 142. 11 Mass., 26, 29. 12 Mass., 137; 175. 5 Peters, 318. 8 Peters, 165. 9 Paige, 188. 6 Johns., 94. 9 Johns., 54. 19 Johns., 568. 7 Cowen, 453. 10 Wend., 88; 271. 23 Wend., 435. 3 Hill, 263. 4 Mass., 595, 597. 6 Mass., 14. 16 Mass, 42. 6 Pick., 203. 16 Pick., 347. 11 Serg. & R., 129. 7 Wend., 68. 7 Watts, 116. 2 Mason, 248. 8 Wheat., 174.

Thus, with regard to *special* agents; that is, to those who are known (not from any usual or customary course of employment, since, if so known, they cannot be altogether regarded as special,[1] but) as being employed for particular purposes and as acting only under special and positive orders, and therefore as having no discretionary or implied powers;—since, as we have just seen, third parties dealing with them, are bound to ascertain, at their own peril, the extent of the authority conferred on them by their principals; it is obvious that they can act in relation to third parties only *in the name* of their principals. And also, as to other agents, whose acts as such can be legally evidenced only by writing; it is perfectly clear that an agent cannot bind his principal by a deed executed in his own name;[2] and it is equally clear, respecting bills of exchange, and other mercantile instruments, drawn, accepted, or indorsed by an agent, that either he must sign the name of his principal to the instrument, or it must appear on its face, in some way or another,—though in what way is immaterial,[3]—that it was in fact so drawn, accepted, or indorsed, *for* him; not that the omission in any way affects the validity of the instrument itself, but because it renders the agent personally liable, and frees the principal from all responsibility.[4]

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[1] See, above, p. 28.

[2] The 'common law' was, in its origin, we must remember, quite a stranger (and not a very friendly one) to the 'law merchant.' Hence, for the proposition that an agent can act only *in the name* of his principal, authorities in the greatest abundance may be found; but which, on examination, will appear as relating chiefly either to the acts of mere servants or to deeds executed by attorney.

[3] 10 Wend., 271, 276. 11 Mass., 33, 34. Dunlap's Paley, 183.

[4] Dunlap's Paley, 183. (4)

As to the right of third parties to sue the principal on contracts made with him through the agent; that will of course depend, in the first place, upon whether or not those contracts shall have been made by the agent as such, that is, *whilst acting within the scope of his authority;* and in the second place, if such contracts shall not have been so made by the agent, upon whether or not they have been adopted by the principal; if, in this last case, they shall not have been so adopted, they can only hold the agent himself responsible.

In general, as we have seen, the acts of the agent as such, that is, as within the scope of his authority, are deemed the acts of the principal himself; so that he is just as much bound by the acts of the agent, while acting within the scope of his authority, as though he himself had performed those acts. And therefore the admissions and declarations of the agent, when he is about the doing of some act within the scope of his authority, are evidence against the principal; because the words are part of the act, and tend to explain or characterise it: naked declarations, however, being no part of any *res gesta*, are not admissible; are, indeed, but mere hearsay, like words spoken by a stranger.[1] But if a third party would avail himself of the acts and declarations of an agent, he must, as formerly stated, prove the agency and the extent of it.[2]

(2[d])—The rights of third parties, in relation to the principal, respecting *payments* to be made to them; are determined, in the first place, by his liabilities to them on contracts made by the agent;—which have just been

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[1] 1 Casey (25 P. S. R.), 394.
[2] 4 Casey (28 P. S. R.), 505.

considered;—and, in the second place, by whether or not the principal have been in some way released. A third party may, as formerly stated, have released the principal by preferring the credit of the agent: or he may have forfeited his right to look to the principal for payment by neglecting to call upon him for a long time after the expiration of the term for which credit was given; in which case the principal will have a right to suppose, either that the money was paid over by the agent, or that the creditor preferred him for his debtor.[1]

If, however, the vendor, on a sale made to an agent, take the promissory note of the agent for the amount of the purchase; on failure of payment by the agent, the principal will be equally liable to the vendor, in an action founded upon the original consideration, just as if the note had been given by the principal himself. For, a promise to pay is no payment;[2] and therefore the written promise of the debtor to pay does not confine the creditor to his remedy under the written instrument: neither is the promissory note of a third person to be deemed a payment, unless accepted *as such*, at the time of the sale.[3] *A fortiori*, the note of the agent can have no higher efficacy to discharge the principal than if made by the principal himself.[4] Nor

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[1] Paley's Ag., 246.

[2] Nor is a receipt, although expressed to be in full, conclusive evidence of payment. See 2 P. Wms., 295. 1 Id., 83, n. 1. 2 Eq. Ca. Ab., 742. 2 T. R., 366. 5 Johns., 68. 7 Id., 311. 1 Paige, 13. 7 Bing., 574. 1 Cowen, 290. 11 Mass., 27.

[3] See Dunlap's Paley, 251, n. (9). 15 Mass., 75, 79.

[4] Dunlap's Paley, 247, n. (3). If the entire credit be given to the agent making the note, a different question is of course presented. 1 Cowen, 359. 1 Liv. Pr. & Ag., 207.

will the taking of the note of an agent at an extended credit, for goods furnished for the benefit of the principal, discharge the principal; unless it is affirmatively shown, on his part, that on the supposition that the debt was paid, or the personal responsibility of the agent accepted for it, he dealt differently with the agent than he would have done, had the note not been taken and the extended credit given.[1]

In all cases, the inquiry is, did the creditor agree, upon accepting the thing given, to accept it *as payment?*[2] For a payment by the agent, in any way, if agreed upon *as* payment, will of course discharge the principal. And it is, moreover, a general rule, that if the creditor voluntarily give an enlarged credit to the agent of the debtor, or as to such agent, adopt a particular mode of payment, whereby the principal is placed in a worse situation than he would otherwise have been; the liability of the original debtor is discharged.[3] And therefore, if a creditor voluntarily, and for his own accommodation, without asking for the cash, prefer to take a bill or note or any other *security* from the agent of a debtor, and such agent afterwards fail; such creditor cannot afterwards resort to the principal for payment.[4] But if the creditor take the security, not voluntarily and for his own convenience, but because he is unable at the time to procure cash, or if he take it

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[1] 15 Wend., 498. 21 Id., 252.

[2] 1 Cowen, 290; 359; 383. 3 Cranch, 318. 6 Id, 268. 5 Johns., 68. 7 Johns., 311. 9 Johns., 309. 11 Johns., 409. 6 Cowen, 181. 1 Wend., 424, 19 Wend., 562. 1 Wash. C. C. R., 516. Peter's C. C. R., 262. 1 Mason, 482. 7 Hill, 128. 8 Cowen, 77. 21 Wend., 450. 1 Hill, 516. 13 Mees. & Wels., 828.

[3] Paley, Ag., 250.

[4] 6 B. & C., 160. 7 B. & C., 19.

conditionally, and not as absolute payment, or if the principal be in no respect prejudiced by the accommodation afforded to the debtor; then, to whatever extent the indulgence may have been carried, the principal will not be released.[1]

It seems, in short, that no act of the agent will operate as a discharge of the principal which could not be pleaded as payment, or as accord and satisfaction, between the creditor and the agent.[2]

(3dd)—The rights of third parties, in relation to the principal, respecting *frauds* and *torts* committed by the agent, are determined chiefly with reference to whether, in committing them, the agent was or was not acting within the general scope of his authority and of the business intrusted to him.

Since the acts of the agent as such, are the acts of the principal; the principal is of course responsible for the acts of the agent in his character of agent;—that is, for such acts of the agent as fall within the scope of his authority and the course of his employment. And consequently the *representations* of the agent, concerning the subject-matter of a contract which he is negotiating for his principal, will bind his principal, if (but only if) *made by him in the course of that negotiation*:[3] upon the same principle, sham bidding and fraudulent puffing by an auctioneer, will render the person for

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[1] See 9 B. & C., 449.

[2] 8 T. R., 451. 4 Campb., 257. 2 Campb., 515. 9 B. & C., 449. Paley's Ag., 251.

[3] 5 Esp. 135. Phill. on Ev. (7th ed.) vol. 1, p. 99. 7 East, 367. 4 B. & Ad. 543. Smith's M. L. 105. 1 Salk. 289. 23 Wend. 260. 4 Mass. 45. 3 Hill. 262. See Dunlap's Paley, 256 to 262 and notes. 4 Watts, 222. 6 P. L. J. 563.

whom he sells liable to the party injured by the fraud;[1] and it has even been held that if one man refer to the evidence or opinion of another, that evidence or opinion is given by the other as his agent, and is receivable in evidence against him by way of admission.[2] It may here, indeed, be stated as a rule to which there will be found few if any exceptions, that every principal will be liable to third parties, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty, on the part of his agent *while acting in the course of his employment;* although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade or disapproved of such acts.[3] For, in any such case, the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, warrants his fidelity and good conduct in all matters pertaining to the agency.[4] Accordingly, actions, against principals, not only for frauds, torts, and defaults, but also for negligence on the part of agents, as in driving carriages,[5] or navigating ships, or even in packing goods to be carried by the master as a common carrier, are in frequent use:[6] while the principal is left to his remedy

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[1] See 8 Howard (U. S.), 134 to 163.

[2] Peake, 238. 1 Camp. 364. 1 Mee. & Wel. 435.

[3] See 1 Salk. 289. 1 T. R. 12. 4 T. R. 66. 7 Bingh. 543. 4 Bos. & Pull. 14. 5 B. & Cress. 547. 2 H. Bl. 267. 1 B. & Pull. 404. 1 East, 106. 9 B. & C. 591. 17 Mass. 98. 1 Metc. 193; 560. 1 Story, C. C. 57. 7 Cush. 385. 5 Gilm. 425. 1 Parsons, 216.

[4] King, J. (in 1 Parsons, 216.)

[5] In 1 East, 106, may be found the leading judgment as to the master's responsibility for negligent driving by his servant.

[6] See fully on the *neglect* or *fraud* of agents, Dunlap's Paley, 294 to 305; and on *tortious acts* of agents, 305 to 308; 396 to 403.

over against the agent in all cases where the tort is of such a nature as to entitle him to compensation from his agent.[1]

Next in order are—

(2cc)—*The Rights of Third Parties in Relation to the Agent.*

In relation to the *agent* then, the rights of third parties are determined—precisely as formerly the rights of the principal and of the agent in relation to them, and their rights in relation to the principal, were determined—either (1de) by *contracts*, or (2de) by *payments*, or (3de) by *frauds and torts*. Thus in order—

(1de)—The rights of third parties in relation to the agent, respecting *contracts*, are determined, in every case, just as is determined the question, whether he has or has not, either as a general agent, acted within the scope of his authority as evidenced by the *usual and uniform course of his employment;* or as a special agent, acted according to his authority as evidenced by *his special orders*. For it is an established rule,—the foundation of which is, that the act of the agent as such, is the act of the principal,—that, *an agent acting within the course of his employment, or the scope of his authority, incurs no personal liability to third parties.*[2] It has of course been observed that wherever this rule operates to charge the principal alone, it at the same time operates to discharge the agent. Thus, as we have seen, if the agent contracting exceeds his author-

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[1] See Story, Ag. § 308 and n. 2.

[2] 12 Ves. 349, 352. 2 Esp. 567. 2 Vern. 146. 2 M. & W. 215, 217. 2 W. C. C. R. 219. 7 Cowen, 456. 12 Iredell, 18. 2 Conn. 435; 680, 682.

ity, he either does or does not bind his principal and discharge himself, according as he is, either a *general* agent known as such from the nature of his authority or the uniform course of his employment, or a *special* agent authorized only by his special directions.

(1ee)—With respect to the rule as it relates to the former; that is, to a *general* agent; it might seem to admit of two exceptions (whether or not properly so called): namely; first, the case where he either conceals his principal, and acts in his own name (by which in a manner he abandons his character of agent), or expressly agrees with the third party to become personally responsible; secondly, the case of ship-masters, who are in general responsible, as well as the owners, for repairs, or stores, or loans of money for such purposes;[1] though, even in this last case, if there are circumstances to show that the owner alone was intended to be made responsible, he alone will be so;[2] so that the inquiry, as respects the agent's liability, is reduced to a single question; namely, *To whom was credit intended to be given?*[3]

If the agent does not disclose his principal's name, he is, without doubt, himself personally responsible.[4] Thus, if without stating his agency, he draws a bill in his own name; he is personally liable, even though he is known to the payee in his character of agent.[5] So if

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[1] See Cowp. 636. 1 Vent. 190; 238. 1 Mod. 85. 2 Lev. 69.

[2] Ca. temp. Hardw. 376. Smith's M. L. 119.

[3] 2 Mees. & Welsb. 440. 12 Johns. 385. 15 Johns. 1. 10 Wend. 277, 1 Cowen, 513. 8 Id. 31. 1 Denis, 402. 6 Mass. 58. 11 Id. 97. 6 Conn. 464. 8 Pick. 56, 62. 2 Fairfield, 267. 23 Pick. 120.

[4] 20 Wend. 431. And yet, a *banker* or *broker* will always be considered as the *agent* of his customers (9 East, 12).

[5] 2 Shepley (14 Maine), 180.

he makes any other contract which does not show on its face that he contracts as agent.[1] But here it is well to note a distinction between *deeds* and *simple contracts*. If an agent executes a contract *under seal*, though no precise form of words is necessary to bind the principal, yet, in order thereto, the capacity in which the agent acts must appear on the face of the instrument.[2] In contracts *not under seal*, however, it will be sufficient to bind the principal, if it clearly appear, even by parol testimony, that such was the intention.[3]

If the agent binds himself personally,—if he expressly agrees to be responsible, even though he gives himself in the contract or covenant the description and character of an agent,[4]—or if he pledges his own credit in any way, as by concealing his principal or otherwise; the third party has, unquestionably, a right of action against him.[5] Nor can he relieve himself from his liability, especially where he shall have entered into an agreement in his own name, by showing that, at the time such agreement was made and signed, the third party knew he was acting only as agent.[6]

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[1] 11 Mass. 29. 12 Mass. 137. 20 Wend. 431. 6 Binney, 234.

[2] 6 Conn. 464. 2 Conn. 680, 682. 1 Freeman, Ch. 408. 1 Blackf. 241. 6 B. Monroe, 612. 6 Cushing, 56; 122. 2 Cushing, 337. 5 Peters, 350. 11 Serg. & R. 126.

[3] See 13 N. Hamp. 32. 8 Pick. 56. 22 Pick. 158, 161. 23 Wend. 435. 4 Hill, 351. 5 Wheat. 326.

[4] 5 East, 148. 6 Mass. 58. 2 Wheat. 56. 4 Mass. 595. 13 Johns. 307. 7 Cowen, 453. 2 Hill (S. Ct.), 294.

[5] 5 M. & P. 549. 2 Esp. 567, 569. 9 B. & C. 78. 15 East, 62. 5 Moore, 276. 3 Camp. 317. 10 Conn. 500. 12 Wend. 413. 4 Monroe, 535. 7 Wend. 106. 2 Littell, 168. 8 Mass. 198. 3 Greenl. 77, 80. 13 John. 58. 20 Wend. 434. 11 Serg. & R. 362.

[6] 8 M. & W. 834. 6 Ad. & El, 486. 2 M. & W. 440. 2 Pick. 221,

But if third parties choose to give credit to irresponsible persons acting by their agents,—especially where it is intended by the agent that his credit shall not be pledged,—that affords no reason whatever why the agent should be charged, and he will not be responsible.[1]

There is one case, perhaps, in which the agent will generally be *presumed* to intend to pledge his own credit; namely, the case of a mercantile agent acting for a *foreign* house.[2] For it has been stated, in very unequivocal terms,[3] that agents or factors, acting for merchants resident in foreign countries, are held personally liable upon all contracts made by them for their employers; and this without any distinction, whether they describe themselves in their contracts as agents or not. In such cases, it is said,[4] the ordinary presumption is, that credit is given to the agents or factors; and not only, that credit is given to the agents or factors, but that it is exclusively given to them, to the exoneration of their employers. It is admitted, however, that this presumption is liable to be rebutted, either by proof that credit was given to both principal and agent, or to the principal only, or that the usage of trade does not extend to the particular case.[5]

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222. 15 N. Hamp. 360. 13 Missouri, 191. 4 Harring. 452. Chitty on Cont. 210 and notes.

[1] Ca. temp. Hardw. 376. 10 Bingh. 283. Smith's M. L. 120, 121.

[2] I say *perhaps;* for there may *possibly* be a doubt as to whether or not this distinction between *home* and *foreign* factors is clearly established in our law. See 22 Wend. 244.

[3] By Mr. Justice Story, Agency, § 268.

[4] Ibid.

[5] Ibid. See also, §§ 290, 400, 448. The arguments of Mr. Justice

(2ee)—With respect to *special* agents, it is, as we have seen, the business of third parties dealing with them, to know, in every case, the extent of their authority. If, however, third parties choose to contract with them without regard to their authority, they can, without doubt, according to the rule above stated, hold them personally liable wherever they exceed their special orders; or, in other words, wherever their principals are not bound by their acts. For, wherever a party undertakes to do any act as the agent of another, if he possesses no authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his real or assumed principal.[1] This doctrine proceeds upon a plain principle of justice; for every person, so acting for another, by a natural and consequently necessary implication, holds himself out as having authority to do the act; and thereby draws the other party into his reciprocal engagement. In short, his conduct amounts to an affirmation, that he has authority to do the particular act; or, at all events, that he *bona fide* believes himself to have that authority:[2] and in either case, since his assumption of authority is

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Story, in support of his position, might, indeed, be deemed conclusive, if the third party were *compelled* to deal with the agent of a foreign house *as an agent*. But he is not. See the opinion of Nelson, C. J., in 22 Wend. 244. And also see the discussions given in Dunlap's Paley, 248, n. (5).

[1] See Paley on Agency, by Lloyd, 386, 387. 3 B. & Adolp. 114. 2 Vern. 127. Livermore, Ag., 255, 256. Story, Ag., § 264.

[2] 3 B. & Adolp. 114. 11 Mass. 97. 3 John. Cas. 70. 16 Mass. 461. 7 Wend. 315. 11 Wend. 477. Paley, Ag., by Lloyd, 386, 387. Story, Ag., § 264; and see ibid. § 265.

the basis upon which the third party acts, it is but fair that the person acting as agent should be held liable to that third party for the damage if any arise in consequence of the falsity of that assumption.[1]

(2de)—The rights of third parties, in relation to the agent, respecting *payments by him to them*,[2] are determined chiefly by whether or not he has rendered himself personally liable to them—either in one of the ways that we have seen, and which it is unnecessary to reconsider, or—by payment to his principal after *notice* from them not to make such payment.

In general, wherever payment or delivery to an agent is made by third parties, under circumstances entitling them to recover it back, they may, without doubt, upon proper *notice* to him, before he have paid or delivered over to his principal, but not otherwise, hold him personally responsible for repayment or redelivery to them.[3] Thus, if money be mispaid to an agent, though expressly for the use of his principal, and, before payment to the principal by him, the person so mispaying correct his mistake by notifying the agent of it; the agent cannot afterwards pay the money over to his principal without rendering himself personally liable to the third party for the amount; for no man should be the gainer by the mistake of another;[4]

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[1] The question how far an agent is personally liable, who, having in fact no authority, professes to bind his principal, has, on various occasions, been discussed. But it is very satisfactorily disposed of in *Broom's Legal Maxims*, pp. 377, 378.

[2] Their rights as respects payments *by them to him*,—see above, tit. (2da),—are of course involved in their relation to the principal, and not in their relation to the agent.

[3] This has, however, in some respects, been supposed to involve some difficulty. (See Smith's M. L. 122 to 124.)

[4] Cowp. 566.

—especially by such a mistake as any one is liable to commit. On the other hand, as the agent ought not to be the gainer, so neither ought he to be the loser: and therefore, if, in any such case, before notice and without knowledge of the mistake, the agent pay the money over to his principal, he will not be liable; the third party must then look to the principal, and not to the agent, who is in no fault.[1]

(3de)—The rights of third parties in relation to the agent, respecting *frauds* and *torts* committed by him, are determined without regard either to his principal or to his character as agent. For, notwithstanding that the principal will be liable in most cases for the fraudulent and tortious acts of his agent acting as such,[2] the agent himself will invariably be so in every case.[3]

An agent is not, however, liable to a third party for a mere *nonfeasance;* that is, for merely neglecting to do, as agent, that which his master is bound, and has deputed him to do. Thus, if the servant of a common carrier should refuse to receive the goods of a third party to be carried, and this on tender of the proper hire; such servant would not be liable to such third party, although the master would, and although the servant himself would be liable to his master for a breach of duty as agent.[4]

There is yet one more thing to be considered; that is—

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[1] Cowp. 566

[2] See above tit. (3dd).

[3] 12 Mod. 488. 1 Leon, 146. Roll. Ab. 94, pl. 5. 1 Bing. N. C. 414. 1 Will. 328. 2 Bl. 867. 4 Bur. 2108. 6 B. & C. 38. 4 M. & S. 259. 2 Lev. 172. Smith's M. L. 125. 28 Maine, 476. 4 Eng. 46.

[4] See Smith's M. L. 125.

(3[a]) The Dissolution or Determination of the Relation.

The relation of agency is determinable, either (1[bb]) *by the will of either of the immediate parties;* or (2[bb]) *by the happening of events rendering it impossible of continuance;* or (3[bb]) *by the accomplishment of its purpose.* Thus in order—

(1[bb])—The determination of the relation as *by the will of either the principal or the agent*, will be first examined.

As between the immediate parties themselves, the relation is of course at any time determinable by mutual consent; and generally, where no injury can result,—as where nothing has been done by the agent,[1]—is determinable at the will of either upon reasonable notice to the other.[2] *At the will of the principal;* unless the trust confided to the agent be but partly executed;[3] or the authority be coupled with an interest in the subject-matter of the agency;[4] or given for a valuable consideration;—as in the case of a power of attorney given by way of security to a creditor;[5] in which case, if the power is not irrevo-

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[1] The power of revoking an authority may be exercised at any moment before the actual exercise of that authority.—Dunlap's Paley, 185. 3 Doug. 300. 2 Camp. 339, n. 3 Camp. 127. 2 Stark. N. P. C. 50. See Story, Ag. § 463.

[2] 2 Camp. 339, notes. 3 Id. 127. 2 Stark. 50. 8 Co. 81 b.

[3] See Russell on Factors, 312. Chitty on Cont. 198 and notes. Story, Ag. §§ 466, 467, 468.

[4] 8 Wheat. 174. 3 Watts & S. 14.

[5] 2 Esp. 565. 7 Ves. 28. Smith's M. L. 111.

cable in terms, it will be deemed irrevocable in law.[1] *At the will of the agent;* if he can determine the relation without injury to his principal. But in either case, *reasonable notice* should be given by the one to the other.[2] Though it has indeed been held,[3] that the principal may revoke the agency, at will, and at any time, without notice: but then, as was at the same time justly observed, if the agent have actually entered upon the business of the agency, and have fairly and in good faith, and in the ordinary course of that business, entered into any engagements, or come under any liabilities, before notice of the revocation, the principal will be bound to indemnify him;—unless indeed the agent have given just cause for such revocation. And so the *agent* also may, at any time, renounce the agency; but only upon reasonable notice, which if he have failed to give, he will be responsible for any damage thereby done to his principal.[4]

With respect to *third parties*, with whom the agent as such (especially as a general agent) has been transacting business; as a general rule, the happening of any event whereby the agency is determined as between the principal and the agent, must be brought to their knowledge (by public advertisement or otherwise) before it will be equitably or even legally determined with respect to them.[5]

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[1] 2 Esp. N. P. 565. 8 Wheat. 174.

[2] 5 Term. R. 211. 2 Greenl. 14. 2 Kent, 644. 5 Binney, 316.

[3] Davies' Rep. 287.

[4] Davies' Rep. 287.

[5] 11 A. & E. 589, 592. 5 T. R. 211, 215. 1 Str. 506. 12 Mod. 346. 10 Id. 110. Story, Ag. § 496. 15 Mod. 346. 5 Binney, 305. 4 Watts & S. 282.

A question may indeed arise, whether, when the authority has been partly executed by the agent, the principal can revoke it in the whole, or only as to the part remaining unexecuted. The true principle would seem to be, that, if the authority admits of severance, or of being revoked as to the part which is unexecuted, either as to the agent, or as to third persons, then, and in such case, the revocation will be good as to the part unexecuted. But if the authority be not thus severable, and damage will thereby happen to the agent on account of the execution of the authority *pro tanto*, then, the principal will not be allowed to revoke the unexecuted part, or, at least, not without fully indemnifying the agent. As to the rights of third parties, in this last case, they of course cannot be affected by the revocation; they will retain all their rights, as well as all the remedies consequent upon any violation of them, in the same manner as if no revocation had taken place.[1]

(2[bb])—The determination of the relation *by the happening of events rendering it impossible of continuance*, is next in order of consideration.

As between the immediate parties, at least, as between the principal and the agent, the relation is in general determinable by the *death*, *lunacy*, or *bankruptcy*, of either. *By the death of the principal*;[2] even though the authority be coupled with an interest;[3] unless the power

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[1] See Story, Ag. §§ 466, 467. 1 Mees. & Wels. 365. 14 East, 582. 2 Wils. & Shaw, 599, n. 1. 1 Barn. & Ald. 681, 683. Russ. Fact. & Bro. 312. Dunlap's Paley, 185, n. (3).

[2] Bac. Abr. tit. *Authority*, E. Co. Litt. 52 b. Chitty on Cont. 197 and notes. Willes Rep. 105, note, and 565. 8 Wheat. 174.

[3] 4 Camp. 272. 2 V. & B. 51. 2 Esp. 565. 7 Ves. 28. 10 B. &

is one which ought in equity to be executed; or unless the interest is one not merely depending upon the exercise of the power, but, in the property or thing itself which is the subject-matter of the agency;—in other words, the only power that can legally survive the death of the grantor, is a power engrafted on an estate in the thing over which it is exercised;[1] for if the title to the thing itself remains in the grantor of the power, the power granted necessarily ceases with the life of the grantor.[2] *By the death of the agent;*—unless coupled with an interest or estate descendible to his heirs or legal representatives;—since his being a party to the relation is then no longer possible; and since without an agent there can be no agency: although, in the Roman law, if the agent had actually entered upon the

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Cress. 731. 1 Stark. 121. 8 Wheat. 174. (See remarks on this last cited case, which goes quite far enough, in) 10 Paige, 205.

[1] 8 Wheat. 174. 5 Cond. Rep. (S. C. U. S.) 400, 405.

[2] Ibid. A power of attorney,—conditionally to make a bill of sale of a vessel (or of vessels) at sea, and in the event of her (their) loss to collect the money which should become due on a policy of insurance,—was given to secure the payment of a loan. The instrument was given with the manifest intention to secure the payment of the loan, and upon the understanding (the parties having taken legal advice) that it was the best legal instrument that could be executed for that purpose. The grantor died insolvent, having paid but a part of the loan; and the vessel (or vessels) having returned, the grantee of the power sought to secure himself by its exercise, in which he was opposed by the administrators of the grantor. Whereupon the cause came up *on bill and answer*. The only *legal* question in the case was, *whether or not*, under the circumstances, *the power was determined by the death of the grantor. This question was disposed of affirmatively.* But the Court, turning to another phase of the case,—that *the legal effect of the instrument was entirely misunderstood by the parties*,—felt unwilling to say that *a court of equity* was incapable of affording relief, and shaped the decree accordingly. (I give this brief of the case because by an eminent jurist and writer it has been cited in support of the very reverse of what it adjudged).

execution of the trust, and left it partly executed at his death, his legal representatives would have been charged with its completion[1]—so great was the respect paid by that law to the intentions of the dead.[2]

By the lunacy of either the principal or the agent[3]—that is, when previously established by the finding of a jury under an inquisition *de lunatico inquirendo;*[4]—the relation is in general also determined: unless in the cases where it would not be determined by death;—as in the case of an authority given to secure an interest to the agent;[5] or as respects third persons, ignorant of the lunacy, and concerned in acts done by the agent under the power.[6]

Also *by the bankruptcy* of either.[7]—By the bankruptcy of the *principal*,[8] except in certain cases, where the interests of creditors cannot be affected and the power is one which in conscience ought to be executed;[9] or where the agent is authorized to do merely

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[1] Dig. 17. 1. 14., and 17. 2. 40.

[2] Lord Ellenborough's too-often quoted question, "*How can a valid act be done in the name of a dead man?*" points to the agent no less than to the principal. The absurdity of such a thing, however, as that of acting in the name of a dead man, might have been even less apparent to his Lordship than the absurdity of his question should be to any executor of a will. Put the question in proper form, if at all. How is it possible to vindicate the rights or discharge the duties of the dead, as relates to their worldly affairs, agreeably to the just intentions that animated them while living? or, more properly, agreeably to the dictates of justice and of humanity, which die not.

[3] See Story, Ag. § 482, note 3.

[4] See 1 Bac. Abr. (ed. by Bouvier) 529. 2 Hall, 495. Dunlap's Paley, 189 n. (7).

[5] See 2 Kent, Com. 645.

[6] Ibid.

[7] See Story, Ag. §§ 482, 483.

[8] 4 Taunt. 541. 16 East, 382. See Livermore, Pr. & Ag. 307.

[9] Smith's M. L. 111, 112.

a formal act, which passes no interest, and which the bankrupt himself might be compelled to perform, notwithstanding his bankruptcy.[1] But since the happening of any event whereby the agency is determined ought to have no retroactive effect, the bankruptcy of the principal will not affect the personal rights of the agent, or of third parties, acquired before notice of such event;[2] it will therefore not affect the agent's lien upon the proceeds of a remittance made to him under orders given by the principal before but received by the agent after the occurrence of the bankruptcy.[3] By the bankruptcy of the *agent*, it has been intimated, the relation may possibly be dissolved; though ordinarily, since he assumes to act only under the authority of his principal, his bankruptcy of itself might not affect his agency.[4]

(3[bb])—The determination of the relation *by the accomplishment of its purpose*, is finally to be considered.

When the agent has executed his trust, the purpose of his appointment is accomplished, and he thence becomes *functus officio*.[5] Where the execution of the trust is limited to take place within a given time, which passes by before the trust is executed, the agency is determined. Such limitation may be fixed, either by express agreement, or by usage of trade:[6] but in

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[1] 4 Taunt. 541. 16 East, 382.

[2] 11 A. & E. 589, 592. 5 T. R. 211, 215. 1 Str. 506. 12 Mod. 346. 10 Mod. 110. Story, Ag. § 496. 15 Mod. 346. 5 Binney, 305. 4 Watts & S. 282.

[3] 4 Camp. N. P. 525.

[4] See Story, Ag. 486. Story on Bailm. § 211.

[5] 2 Camp. 341, 343. 7 Ves. Jun. 276. 1 M. & P. 513. 1 Bailey, 648. 4 Camp. 279. 1 M. & Rob. 327.

[6] See Story, Ag. § 480. 4 Camp. 279.

either case, the purpose of the relation may be presumed to have been attained, or its attainment to have become impossible.

It is hardly necessary to remark, that the determination of the relation as to the superior agent, will be a determination as to the sub-agent, or the substitute.[1]

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[1] See 2 Livermore, Pr. & Ag. 305.